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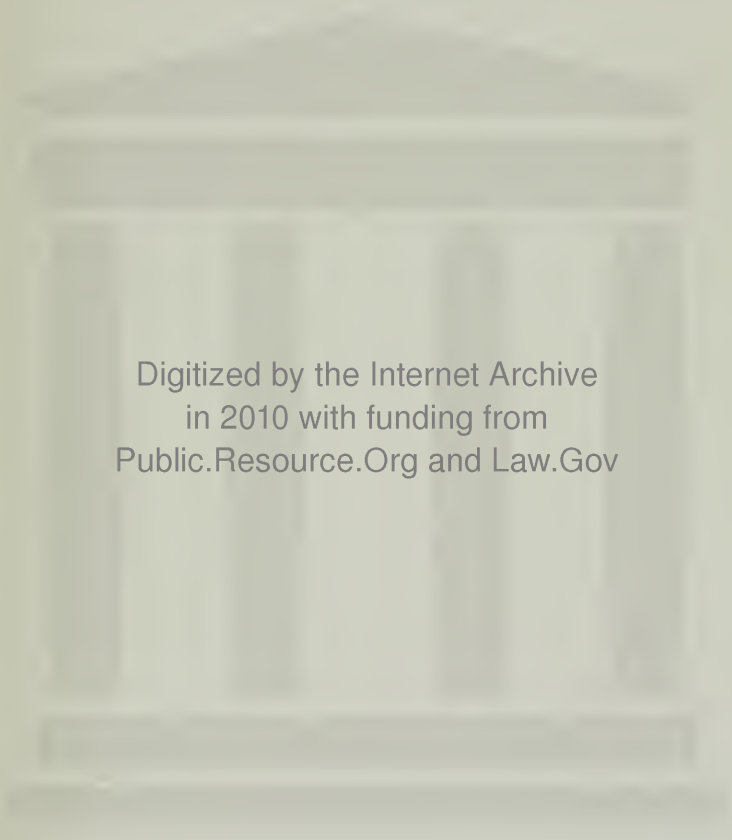
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46
No. 15599

United States
Court of Appeals
for the Ninth Circuit

ELMER F. SHEPARD and KATHYRN SHEP-
ARD, His Wife,

Appellants,

vs.

CAL-NINE FARMS, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

SEP 13 1957

No. 15599

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Court of Appeals
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	8
Ex. A—Option to Purchase.....	9
B—Escrow Instructions	13
Answer, Amended	80
Attorneys of Record.....	1
Civil Docket Entry of Judgment, January 10, 1957	40
Clerk's Certificate to Record on Appeal.....	369
Complaint	3
Complaint, Amended	17
Deposition of Shepard, Elmer F.....	51
Findings of Fact and Conclusions of Law.....	33
Minute Entries:	
May 17, 1956—Proceedings of Trial.....	22
May 18, 1956—Proceedings of Trial.....	24
May 21, 1956—Proceedings of Trial.....	26
November 23, 1956—Order for Judgment.	28
January 10, 1957—Order Overruling Ob- jections to Findings, etc.....	32

	INDEX	PAGE
Minute Entries—(Continued):		
March 1, 1957—Order Denying Motion for New Trial		49
Motion for New Trial.....		40
Memorandum of Points and Authorities..		42
Notice of Hearing Motion for New Trial..		48
Notice of Appeal.....		49
Objections to Proposed Findings of Fact and Conclusions of Law Submitted by Plaintiff.		28
Order Extending Time to File and Docket Rec- ord		50
Statement of Points on Appeal.....		372
Transcript of Proceedings.....		79
Answer, Amended		80
Witnesses, Defendants':		
Brooks, Roosevelt		
—direct		319
Kimes, William		
—direct		349
—cross		351
—redirect		352
Lancey, Francis J.		
—direct		322
—cross		326

INDEX

PAGE

Witnesses, Defendants'—(Continued):

Miller, Lyman

—direct 346, 353

—cross 348

Shepard, Elmer F.

—direct 354

—cross 358

—redirect 358

—recross 359

Thiebeau, Robert T.

—direct 316

Wood, Ernest

—direct 327

—cross 338

—redirect 344

Witnesses, Plaintiff's:

Brown, Kenneth G.

—direct 227

—cross 239

—redirect 243

—recross 244

Cameron, Gordon

—direct 188

—cross 201

—redirect 218, 226, 227

—recross 222, 226

Witnesses, Plaintiff's—(Continued):

Carter, James R.

—direct 286

Haas, Henry

—direct 264

—cross 272

Lanford, Robert L.

—direct 250

—cross 254

Makin, Mark

—direct 256

—cross 259

—redirect 263

—recross 264

Otto, Ernest H.

—direct 82, 359

—cross 124, 362

—redirect 155

—recross 158

Roberts, C. K.

—direct 305

—cross 307

Shepard, Elmer F.

—cross 159, 245

INDEX

PAGE

Witnesses, Plaintiff's—(Continued):

Tower, Verne A.

—direct	294
—cross	297
—redirect	303
—recross	304

Walmsley, Simcoe

—direct	281
—cross	283
—redirect	284
—recross	285

ATTORNEYS OF RECORD

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Attorneys for Appellee.

In the United States District Court
for the District of Arizona

No. 2343

CAL-NINE FARMS, a Corporation,

Plaintiff,

vs.

ELMER F. SHEPARD & KATHRYN M. SHEP-
ARD, His Wife,

Defendants.

COMPLAINT

Comes Now plaintiff and complains of defendants
as follows:

First Count

I.

Plaintiff is a corporation organized and existing
under the laws of California, and is a citizen of
California. Defendants are citizens and residents of
Arizona. The amount in controversy in this case
exceeds \$3,000.00 exclusive of interest and costs.

II.

On or about November 18, 1954, plaintiff entered
into an option agreement with defendant Elmer F.
Shepard, whereby in consideration of the payment
of \$2,000.00 plaintiff was given an option for two
months to purchase that certain land in Maricopa
County more particularly described as follows:

The North 1/2 of Sec. 21, Township 1 North,
Range 9 West, Gila & Salt River Base & Meridian.

III.

On or about January 11, 1955, plaintiff exercised its option rights under the agreement referred to in Paragraph II and agreed with defendants to purchase said land together with the following described personal property, which under certain escrow instructions, hereinafter referred to, was considered to be a part of the real property:

Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial #PM3885; Superior 60510 Natural Gas Engine, Serial #15350; and Fairbanks Horse Gear Head FN6A 1:2 ratio WLS Watson Splicer Drive w/f flanges, Serial #PN219.

for a price of \$80,000 payable as follows: \$18,000 down, \$2,000 paid for option credited on purchase price, principal balance of \$60,000 payable in seven annual installments commencing February 1, 1956, and progressing in amount from \$7,000 in 1956 to \$10,500 in 1962, together with annual installments of interest at the rate of 5% per annum on the unpaid balance. This agreement of purchase was evidenced by certain escrow instructions signed by plaintiff and defendants on January 11, 1955, and directed to the Phoenix Title & Trust Company as escrow agent. Said land and property was then owned by defendants as community property.

IV.

Plaintiff has paid to defendants the sum of \$20,000 as required by the agreement referred to in

Paragraph III, and has performed all of the things required of it by said contract.

V.

Immediately prior to the execution of the option agreement referred to in Paragraph II, during the negotiations prior to said execution, defendant Elmer Shepard made the following warranties and representations to plaintiff's agents, Ernest Otto & Henry Haas:

(a) He represented that the well on said land was in good working order and in good state of repair.

(b) He represented that the well on said land was capable of pumping an average of twenty-two hundred (2,200) gallons per minute, and would continue to have such capacity.

VI.

Each of said warranties and representations was a part of defendants' undertaking and promise under the land purchase agreement referred to in Paragraph III, and was bargained for by plaintiff in entering into said agreement.

VII.

Each of said warranties and representations was false, said well being in bad and steadily deteriorating condition, and incapable of pumping twenty-two hundred (2,200) gallons per minute at the time the land was turned over to plaintiff.

VIII.

Defendant Elmer Shepard knew the same were false, or made the same in reckless or negligent ignorance and disregard of whether they were true or false.

IX.

Defendant made said representations wantonly, wilfully and maliciously, with intent that they should be relied upon by plaintiff's agents, said Otto & said Haas, and acted on by said agents who would be induced thereby to pay the purchase price of \$80,000 for said land.

X.

Said representations and warranties were material to the above-described transaction regarding said land, in that the condition and capacity of a well on desert land is an important and often controlling factor in the value of such land.

XI.

Plaintiff's agents were ignorant of the falsity of said representation and warranties, believed the same to be true, and relied thereon in entering into the agreement above described for the sale of said land.

XII.

Plaintiff's agents were prevented by defendant Elmer Shepard from ascertaining the truth as to said representations, and plaintiff's agents further made such other investigation as they reasonably could as to the truth of said representations, all without learning of the falsity of said representations.

XIII.

As a direct and proximate result of the above described misrepresentations of defendant Elmer Shepard, plaintiff has been forced to drill a new well and install new equipment therein, all to plaintiff's damage in the amount of \$22,500.00.

XIV.

As a direct and proximate result of the above-described misrepresentation of defendant Elmer Shepard, plaintiff suffered a partial failure of its cotton crop grown on said land, as a result of lack of water, all to plaintiff's damage in the amount of \$23,025.00. Defendant Elmer Shepard knew that plaintiff contemplated raising cotton on said land, and he further knew that an adequate supply of water was essential for a cotton crop.

Wherefore, plaintiff prays that:

1. It have judgment against defendants in the amount of forty-five thousand five hundred twenty-five dollars (\$45,525.00) actual damages;
2. It have judgment against defendants for twenty thousand dollars (\$20,000.00) punitive and exemplary damages;
3. It recover its costs herein expended;
4. It have such other relief as to the Court may seem just and proper.

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,

Attorneys for Plaintiff.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit the allegations of paragraphs I, II and III of plaintiff's complaint.

II.

Deny the allegations of paragraphs IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of plaintiff's complaint.

III.

Defendants allege that the option to purchase referred to in plaintiff's complaint, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof by reference as if set out at length herein, and the escrow instructions to Phoenix Title & Trust Company, Escrow No. 522656, dated January 11, 1955, a copy of which is attached hereto, marked Exhibit "B" and made a part hereof by reference as if set out at length herein, constitute the entire agreement between the parties for the sale of the property described in plaintiff's complaint, and that no other, further or different agreement, whether oral or written, exists between the parties; that no representations, warranties or undertakings were made to plaintiff by these defendants, or either of them.

Wherefore, defendants pray that plaintiff take nothing by its complaint; that defendants be awarded their costs necessarily incurred herein, and for such other and further relief as the court deems proper in the premises.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,

Attorneys for Defendants.

EXHIBIT A

(Copy.)

OPTION TO PURCHASE

This Agreement, made this 17th day of November, 1954, by and between E. F. Shepard, of Buckeye, Arizona, hereinafter called first party, and Ernest H. Otto and Henry Haas, hereinafter called second parties, Witnesseth:

Whereas, the first party is the owner of certain real estate situated in Maricopa County, State of Arizona, described as follows:

The North Half of Section 21, Township One North, Range Nine West, G&SRB&M, Maricopa County, Arizona,

and the following personal property:

1. House trailer and furnishings.
2. Approximately 100 irrigation siphon tubes.

And Whereas, the second parties desire an option to purchase said real and personal property:

Now Therefore, the first party, in consideration of Two Thousand and No/100 Dollars (\$2,000.00) duly paid by the second parties, receipt of which is hereby acknowledged, agrees to sell and convey to the second parties and to their successors or assigns, at any time before twelve o'clock noon, on January 17, 1955, the following described real estate situated in the County of Maricopa, State of Arizona, to wit:

The North Half of Section 21, Township One North, Range Nine West,

including the following personal property:

1. House trailer and furnishings.
2. Approximately 100 irrigation siphon tubes.

for the price of Eighty Thousand and No/100 Dollars (\$80,000.00), good and lawful money of the United States of America, payable as follows:

A down payment of Twenty Thousand and No/100 Dollars (\$20,000) upon acceptance of said option, the Two Thousand Dollar (\$2,000.00) payment under option shall be credited on the down payment.

The balance with interest at 5% payable as follows:

\$7,000.00 plus interest on or before February 1,
1956

\$7,500.00 plus interest on or before February 1,
1957

\$8,000.00 plus interest on or before February 1,
1958

\$8,500.00 plus interest on or before February 1,
1959

\$9,000.00 plus interest on or before February 1,
1960

\$9,500.00 plus interest on or before February 1,
1961

\$10,500.00 plus interest on or before February 1,
1962

It is further agreed that if the second parties exercise the option to purchase the said property, under the terms aforesaid, on or before the date of expiration as provided herein, the first party will place said agreement and sale in escrow with a Title Company.

The first party further agrees not to sell or offer for sale the above-described real estate during the life of this option.

It is further agreed that time is of the essence of this contract, and that unless the second parties shall tender their acceptance of said offer to sell by said first party as above set out on or before the 17th day of January, 1955, this contract shall expire and terminate by limitation, and a failure on the part of the second parties, their successors or assigns, to perform the conditions provided herein, shall work as a forfeiture of all money paid as a consideration for this agreement, and the said consideration shall be retained by the first party as

full payment and settlement for the option granted by this instrument.

This agreement shall constitute the entire contract between the parties hereto, and no modification hereof, shall be binding unless indorsed hereon in writing and no agent, salesman, or person other than an officer of the second parties, is or shall be authorized to modify the terms of this instrument or to change any of the provisions hereof.

Witness Our Hands this 18th day of November, 1954.

/s/ E. F. SHEPARD,

/s/ ERNEST H. OTTO,

/s/ HENRY HAAS.

State of Arizona,
County of Maricopa—ss.

On this, the 18th day of November, 1954, before me, the undersigned Notary Public, personally appeared E. F. Shepard, Ernest H. Otto, and Henry Haas, known to me to be the persons whose names are subscribed to the foregoing instrument and who acknowledged to me that they executed the same for the purpose therein contained.

[Seal]

RUTH S. BRINCK,
Notary Public.

My Commission Expires May 14, 1956.

SELLER:

- 1 Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.

SELLER AND BUYER:

- 2 Will deliver to Escrow Agent all documents, pay to Escrow Agent all sums and do or cause to be done all other things necessary, in the sole judgment of Escrow Agent, to enable it to comply herewith and to enable Phoenix Title and Trust Company to issue any title insurance policy provided for herein.
 - 3 Should these instructions contemplate a transfer of an interest in an agreement for sale, Seller and Buyer will deliver to Escrow Agent such documents as Escrow Agent may, in its sole judgment, require for the benefit of any party to said agreement.
 - 4 Authorize Escrow Agent to pay, from any funds held by it for their respective credit hereunder, all amounts necessary to procure the delivery of such documents and to pay, on their behalf, all charges and obligations payable by them respectively, as specified herein.
 - 5 Will each pay to Escrow Agent, upon demand, all charges payable by them respectively, as provided herein.
 - 6 Authorize Escrow Agent to execute, on their behalf, term assignments, or otherwise order changes in any insurance called for herein other than title insurance and forward the policies to insurer's agent with the request that insurer consent to such transfer, attach less payable clause or make such other additions or corrections as may be specifically required herein, and that said agent thereafter return such policies to Escrow Agent or to the parties entitled thereto.
 - 7 Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.
 - 8 Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in an action of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.
 - 9 Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions or the escrow or any court action arising therefrom and will pay the same upon demand.
 - 10 Grant to Escrow Agent a lien upon and authority to reimburse itself for its charges and for any damages or expenses which it may incur or sustain in connection herewith, from all of the rights, title and interest of Seller and Buyer in all of the documents and money deposited hereunder.
 - 11 Direct that no notice, demand or change in these instructions shall be of effect unless given in writing and that these instructions, and any subsequent instructions, given mutually by Seller and Buyer to Escrow Agent in connection herewith shall constitute the complete escrow instructions, notwithstanding any agreement which Seller and Buyer may have concerning the property.
 - 12 Direct that all money payable hereunder be paid to Escrow Agent which, upon receipt thereof, shall deposit such funds in an Arizona bank in a general escrow account from which all disbursements shall be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements herein, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writing to accept liability for the sufficiency thereof.
 - 13 Authorize Escrow Agent to act, upon any statement furnished by the holder or payee, or a collection agent for the holder or payee, of any lien on or charge or assessment in connection with the property, concerning the amount of such lien or assessment or the amount secured by such lien without liability or responsibility for the accuracy of such statement.
 - 14 Direct that when these instructions have been complied with and Phoenix Title and Trust Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver by filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's Office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein, at which time Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. All other papers or documents may, at the option of Escrow Agent, be delivered to the party entitled thereto by mail in the manner herein provided for mailing of Notices, Demands or Declarations.
 - 15 Agree that the employment of Phoenix Title and Trust Company, as Escrow Agent, shall not affect any rights or interests which may be subordinated under the terms of any title insurance policy issued pursuant to the provision thereof.
- CANCELLATION:**
- 16 In either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within three days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.
 - 17 When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall, within three days thereafter, send a copy of said notice to the other party in the manner provided herein for the fulfilment of its obligation.
 - 18 In the event said either party shall fail within said thirteen-day period to comply with all of the terms hereof, then the terms shall become cancelled and Escrow Agent is thereupon authorized:
 - 19 First: To pay to the party electing to cancel, any actual money deposited hereunder by said other party, after deducting any charges;
 - 20 Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;
 - 21 Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid;
 - 22 Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent.

23. If, under these instructions, a commission is to be paid to a real estate Agent, then, notwithstanding any conflicting provision herein contained:

(a) The party obligated to pay the commission shall not acquiesce in any mutual cancellation of these instructions without having first delivered said real estate Agent's written consent to Escrow Agent.

(b) Upon the cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, become payable to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate Agent therefrom, a sum equal to one-half of the earned money deposited by any other party and payable to the party so obligated, but not more than the full amount of such commission.

24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Phoenix Title and Trust Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller.

AGREEMENTS FOR SALE OF REAL PROPERTY:

25. Should any part of the amount provided to be paid by Buyer be evidenced by an agreement for sale, an executed copy thereof, the deed herein provided to be furnished by Seller, a deed of the property from Buyer to Seller and such other documents as Escrow Agent may, in its sole judgment, require will be delivered by Seller and Buyer to Escrow Agent which shall represent said agreement and hold said deeds until such time as all sums due for the account of Seller under said agreement for sale have been paid and the instructions herein have been met, at which time Escrow Agent shall deliver said deeds and other documents to Buyer.

26. If Buyer is in default under such agreement, Seller may either elect to bring an action against Buyer for specific performance of arrangement or enforce a forfeiture thereof in any lawful manner, including, but not limited to, forfeiture by notice as hereinafter provided, but only after the expiration of the full term of the following periods:

27. Where Buyer has paid on the purchase price: Less than 20%—30 days; 20% or more, but less than 30%—60 days; 30% or more, but less than 50%—120 days; 50% or more—9 months. In computing said percentages, the amount of any agreement for sale or mortgage agreed to be paid by Buyer shall be treated as payment only to the extent of principal actually paid thereon by Buyer.

28. If Seller elects to forfeit such agreement by notice, Seller shall do so through Escrow Agent by delivering to Escrow Agent a written declaration of forfeiture directed to Buyer together with a fee of \$5.00. Escrow Agent shall, within three days thereafter, send a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, Demands or Declarations.

29. If Buyer fails to comply with the terms of such agreement to the date of such compliance before the expiration of ten days from the date said copy was deposited in the United States mail as herein provided, Escrow Agent is authorized to deliver to Seller the documents and money deposited under these instructions or under such agreement.

30. Seller and Buyer shall pay the following amounts to Escrow Agent for its services in receiving, accounting for, and remitting funds received under such agreement: If agreement is fully performed within one year from its date \$5.00 each; if agreement is not fully performed within one year from its date, \$5.00 each at the end of the first year and a like sum at the end of each succeeding year or fraction thereof prior to full performance, except that if Buyer shall have paid in any one year of said agreement a sum in excess of \$5,000.00, Seller shall pay to Escrow Agent a sum equivalent to one-tenth of one per cent of such payment in lieu of said \$5.00 payable by Seller. If such agreement is terminated by mutual consent prior to performance in full thereof, Buyer and Seller shall pay Escrow Agent \$3.00 each as a termination charge.

31. If disbursements are made to other than the parties hereto by reason of death, insolvency, bankruptcy, or incompetency of Seller, or by reason of any legal proceedings, Escrow Agent shall be paid an additional charge of \$10.00.

NOTICES, DEMANDS OR DECLARATIONS:

32. The respective addresses of Seller and Buyer as set forth herein or the last notice of change thereof filed with Escrow Agent by the respective parties, shall be used by Escrow Agent in mailing any Notice, Demand or Declaration to either party.

33. If, for any reason, a Notice, Demand or Declaration of any kind is to be given by either party to the other party, said Notice, Demand or Declaration shall be in writing, signed by the party giving the Notice or making the Demand or Declaration and directed to the other party and shall be filed with Escrow Agent. Escrow Agent shall within three days after receipt of said Notice, Demand or Declaration, send it to the party to whom it is directed by enclosing a copy of said instrument in an envelope addressed to said party at the last address which said party shall have furnished Escrow Agent, or if no address has been so filed, to said party, in care of General Delivery, at the City in which the office of Escrow Agent is located as shown on the first page of these instructions, and depositing said envelope with proper postage affixed thereto in the United States mail.

34. The mailing of any such instrument by Escrow Agent in the manner herein provided shall constitute notice of the contents of such instrument to the party to whom the instrument is directed as of the date of such mailing and no further notice thereof shall be required.

DEFINITIONS:

35. The words "charges" as used herein, refers to all charges and advances made and obligations incurred by Escrow Agent in connection herewith, and all charges of Phoenix Title and Trust Company in connection with the issuance of its title insurance policy or the cancellation of any order therefor.

36. The word "property" as used herein, refers to the real property described in and which is the subject of these instructions.

37. The word "party" as used herein, refers to Seller or Buyer as the case may be.

38. The phrase "Seller and Buyer" as used herein, refers to Seller and Buyer both jointly and severally unless otherwise specified.

39. The day provided herein within which compliance with any requirement must be met shall end at the close of the then regularly established public business hours of Escrow Agent for such day, provided should Escrow Agent be closed during any said business hours on said day such requirement may be met on the next succeeding day on which Escrow Agent is open for business throughout said business hours.

TITLE INSURANCE.

40 The title insurance provided for herein, shall be subject to the conditions of and evidenced by the regular form of owners title insurance policy of Phoenix Title and Trust Company against loss by reason of defects in title to be insured by Buyer. Said policy, upon issuance, shall insure Buyer against loss by reason of defects in title to the property on the date of filing for record of the documents as provided herein subject to such of the following exceptions as may be applicable in addition to the regular printed exceptions contained in Schedule B, thereof:

- (a) Taxes and assessments payable by Buyer as set forth herein;
- (b) Building and other restrictive covenants to which the property is subject;
- (c) Easements and rights of way for roadways, canals, laterals, ditches and Public Utilities over and across the property;
- (d) Mortgages referred to herein;
- (e) Rights of parties under the agreement for sale referred to herein;
- (f) Rights of Buyer under the agreement for sale provided for herein.
- (g) Any liens or encumbrances affecting said property suffered or incurred through any act or fault of the party insured or anyone deriving an interest in said property by or through the said party insured;
- (h) Liabilities and obligations imposed on the land by inclusion in any water or irrigation district

41. **NOTE:** There are some matters which Phoenix Title and Trust Company does not attempt to investigate or determine and for which it assumes no liability. While not a complete list, experience has shown that among these, the following deserve your particular consideration:

- (a) Unrecorded mechanic's and material men's liens.
- (b) Current personal property taxes.
- (c) Utility charges, such as electric, gas, water and sewer.
- (d) Charges for irrigation water and power.
- (e) Boundary lines, location of improvements and possession.
- (f) Compliance with limitations on use of the property, such as zoning and building ordinances and building and other restrictions.
- (g) Premiums for fire insurance policies provided for herein. (It is your obligation to determine that such premiums are paid and that such policies are in effect).
- (h) Reservations and exceptions in Patents, such, for example, as oil or mineral reservations.

The total consideration herein includes the following equipment, which is considered to be a part of the real property:

Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft,
Serial #PK9885;
Superior 6G510 Natural Gas Engine, Serial #15350; and Fairbanks Morse Gear
Head FNCA 1:2 ratio WL8 Watson Splicer Drive w/f flanges, Serial #PN219.

The total sales price also includes the following personal property: House trailer with furnishings in trailer, including Servel refrigerator; and approximately 100 irrigation siphon tubes. This personal property is to be considered to belong to buyer when the deed and mortgage are recorded, the cash payment disbursed, and this escrow closed. No bill of sale is required.

The house trailer is not being used on the highway and no certificate of title is to be transferred through this escrow.) The parties hereto understand that Phoenix Title and Trust Company makes no representations as to personal property.

The seller herein recognizes that buyer has exercised that certain option dated 11/17/54, between E.F. Shepard, first party and Ernest H. Otto and Henry Haas, second parties, by the execution of these escrow instructions and the deposit of balance of option funds.

E. F. SHEPARD

Seller

By ERNEST H. OTTO

Buyer

KATHRYN M. SHEPARD

Seller

By HENRY HAAS

Buyer

CAL-NINE FARMS

Endorsed: Filed December 30, 1955.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now plaintiff and complains of defendants as follows:

First Count

I.

Plaintiff is a corporation organized and existing under the laws of California, and is a citizen of California. Defendants are citizens and residents of Arizona. The amount in controversy in this case exceeds \$3,000.00 exclusive of interest and costs.

II.

Plaintiff brings this action in its own right and as assignee of the rights of Ernest Otto and Henry Haas.

III.

On or about November 18, 1954, said Ernest Otto and Henry Haas entered into an option agreement with defendant Elmer F. Shepard, whereby in consideration of the payment of \$2,000.00 plaintiff was given an option for two months to purchase that certain land in Maricopa County more particularly described as follows:

The North $\frac{1}{2}$ of Sec. 21, Township 1 North, Range 9 West, Gila & Salt River Base & Meridian.

Otto and Haas took this option with the intent that it be taken up by plaintiff, a corporation which they contemplated forming under the laws of California.

IV.

On or about January 11, 1955, plaintiff exercised its option rights under the agreement referred to in Paragraph III and agreed with defendants to purchase said land together with the following described personal property, which under certain escrow instructions, hereinafter referred to, was considered to be a part of the real property:

Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial No. PM3885; Superior 60510 Natural Gas Engine, Serial No. 15350; and Fairbanks Horse Gear Head FN6A 1:2 ratio WLS Watson Splicer Drive w/f flanges, Serial No. PN219

for a price of \$80,000 payable as follows: \$18,000 down, \$2,000 paid for option credited on purchase price, principal balance of \$60,000 payable in seven annual installments commencing February 1, 1956, and progressing in amount from \$7,000 in 1956 to \$10,500 in 1962, together with annual installments of interest at the rate of 5% per annum on the unpaid balance. This agreement of purchase was evidenced by certain escrow instructions signed by plaintiff and defendants on January 11, 1955, and directed to the Phoenix Title & Trust Company as escrow agent. Said land and property was then owned by defendants as community property.

V.

Plaintiff has paid to defendants the sum of \$20,000 as required by the agreement referred to in

Paragraph IV, and has performed all of the things required of it by said contract.

VI.

Immediately prior to the execution of the option agreement referred to in paragraph III, during the negotiations prior to said execution, defendant Elmer Shepard made the following warranties and representations to Otto and Haas, who were plaintiff's agents and are plaintiff's assignors:

(a) He represented that the well on said land was in good working order and in a good state of repair.

(b) He represented that the well on said land was capable, on an average, of pumping twenty-two hundred (2200) gallons per minute and would continue to have such a capacity for a reasonable time.

(c) He concealed from Otto and Haas the history and condition of said well.

VII.

Each of said warranties and representations was a part of defendants' undertaking and promise under the land purchase agreement referred to in Paragraph IV, and was bargained for by plaintiff in entering into said agreement.

VIII.

Each of said warranties and representations was false, said well being in bad and steadily deteriorating condition, and incapable of pumping twenty-two hundred (2,200) gallons per minute at the time

the land was turned over to plaintiff. Contrary to the statements of defendant Shepard, said well had a history of costly and unsatisfactory repairs.

IX.

Defendant Elmer Shepard knew the same were false, or made the same in reckless or negligent ignorance and disregard of whether they were true or false.

X.

Defendant made said representations wantonly, wilfully and maliciously, with intent that they should be relied upon by plaintiff's agent, said Otto and said Haas, and acted on by said agents in that plaintiff would be induced to pay the purchase price of \$80,000 for said land.

XI.

Said representations and warranties were material to the above-described transaction regarding said land, in that the condition and capacity of a well on desert land is an important and often controlling factor in the value of such land.

XII.

Plaintiff's agents were ignorant of the falsity of said representation and warranties, believed the same to be true and relied thereon in entering into the agreement above described for the sale of said land.

XIII.

Plaintiff's agents were prevented by defendant Elmer Shepard from ascertaining the truth as to

said representations, and plaintiff's agents further made such other investigation as they reasonably could as to the truth of said representations, all without learning of the falsity of said representations.

XIV.

As a direct and proximate result of the above-described misrepresentations of defendant Elmer Shepard, plaintiff has been forced to drill a new well and install new equipment therein, all to plaintiff's damage in the amount of \$22,500.00.

XV.

As a direct and proximate result of the above-described misrepresentation of defendant Elmer Shepard, plaintiff suffered a partial failure of its cotton crop grown on said land, as a result of lack of water, all to plaintiff's damage in the amount of \$23,025.00. Defendant Elmer Shepard knew that plaintiff contemplated raising cotton on said land, and he further knew that an adequate supply of water was essential for a cotton crop.

Wherefore, plaintiff prays that:

1. It have judgment against defendants in the amount of forty-five thousand five hundred twenty-five dollars (\$45,525.00) actual damages;
2. It have judgment against defendants for twenty thousand dollars (\$20,000.00) punitive and exemplary damages;
3. It recover its costs herein expended;

4. It have such other relief as to the Court may seem just and proper.

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,
Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—THURSDAY, MAY 17, 1956

Honorable Dave W. Ling, United States District
Judge, presiding.

This case comes on regularly this day for trial. Keith Ragan, Esq., and William Rehnquist, Esq., are present for the plaintiff. Haze Burch, Esq., appears as counsel for the defendants.

Counsel for the plaintiff presents and files Motion for Leave to File Amended Complaint.

It Is Ordered that said motion is granted and that defendants be allowed to file answer to amended complaint at a later date.

Counsel for the defendants reads into the record an answer to amended complaint.

The rule on witnesses is invoked and the following witnesses are sworn and excluded from the Courtroom:

Robert H. Theibeau
Roosevelt Brooks
Ernest H. Otto
H. Walker Harrison
Ernest Wood
Mark Makin
Henry Haas
Elmer F. Shepard

Henry Haas and Elmer F. Shepard are excepted from the Rule.

Plaintiff's Case:

Ernest H. Otto is called and examined on behalf of the plaintiff.

The following plaintiff's exhibits are admitted in evidence:

- 1—Option agreement to purchase.
- 2—Escrow Instructions.
- 3—Bill.
- 4—Bills.
- 5—Bills.
- 6—Bills.
- 7—Bills.

At 12:00 o'clock noon, It Is Ordered that the further trial of this case is continued to 2:00 o'clock p.m.

Subsequently, at 2:00 o'clock p.m., the parties and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Ernest H. Otto is recalled and further examined on behalf of the plaintiff.

Elmer F. Shepard is called and cross-examined as an adverse party.

Gordon Cameron is sworn and examined on behalf of the plaintiff.

The following Plaintiff's exhibits are admitted in evidence:

- 8—Assignment.
- 9—Bills of State Tractor & Equipment Co.
- 10—Statements of State Tractor & Equipment Co.
- 11—Statement of Gordon Cameron.
- 12—Record of State Land Department.
- 13—Record of State Land Department.
- 14—Photostats of Log of Gordon Cameron.

At 4:20 o'clock p.m., It Is Ordered that the further trial of this case is continued to Friday, May 18, 1956, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY—FRIDAY, MAY 18, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

The parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Gordon Cameron is recalled and further examined on behalf of the plaintiff.

Kenneth Brown is sworn and examined on behalf of the plaintiff.

Elmer F. Shepard is recalled and further examined as an adverse party.

Plaintiff's exhibit 15, Statements, is admitted in evidence.

Robert Lamford is sworn and examined on behalf of the plaintiff.

Mark Makin, heretofore sworn, is called and examined on behalf of the plaintiff.

Henry Haas heretofore sworn, is called and examined on behalf of the plaintiff.

At 11:55 o'clock a.m., It Is Ordered that the further trial of this case is continued to 2:00 o'clock p.m.

Subsequently, at 2:00 o'clock p.m., the parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Plaintiff's exhibit 16, Cotton Loan Program Schedules, is admitted in evidence.

Simcoe Walmsley is sworn and examined on behalf of the plaintiff.

Plaintiff's exhibit 17, Memorandum, is admitted in evidence.

James R. Carter is sworn and examined for the plaintiff.

Plaintiff's exhibit 18, Flow Chart, is admitted in evidence.

Verner A. Tower is sworn and examined for the plaintiff.

C. K. Roberts is sworn and examined for the plaintiff.

Plaintiff's exhibit 19, Certificate of Corporation Commission, is admitted in evidence.

The plaintiff rests.

Counsel for the defendant moves for judgment for the defendant and states his grounds therefor.

It Is Ordered that said motion for judgment is denied.

Defendants' Case:

The following defendants' witnesses are called and examined:

Robert H. Thiebeau

Roosevelt Brooks

At 3:20 o'clock p.m., It Is Ordered that the further trial of this case is continued to Monday, May 21, 1956, at 2:30 o'clock p.m.

[Title of District Court and Cause.]

MINUTE ENTRY—MONDAY, MAY 21, 1956
Honorable Dave W. Ling, United States District
Judge, presiding.

The parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Defendants' Case Continued:

Francis J. Lancey is sworn and examined on behalf of the defendants.

Defendants' exhibit A, Statement, is admitted in evidence.

Ernest Wood, heretofore sworn, is called and examined for the defendant.

The following defendants' witnesses are sworn and examined:

Lyman Miller

William Kimes

Lyman Miller is recalled and further examined on behalf of the defendants.

Elmer F. Shepard is called and examined on behalf of the defendants.

The defendants rest.

Rebuttal:

Ernest H. Otto is recalled and further examined for the plaintiff.

It Is Ordered that the record show the deposition of Elmer F. Shepard may be considered in evidence on stipulation.

Both sides rest.

It Is Ordered that the record show this case will be submitted upon the filing of briefs; that plaintiff is allowed 20 days to file opening brief, the defendant 20 days to answer and the plaintiff 10 days to reply.

[Title of District Court and Cause.]

MINUTE ENTRY
FRIDAY, NOVEMBER 23, 1956

Honorable Dave W. Ling, United States District
Judge, presiding.

This case having been submitted and by the court
taken under advisement,

It Is Ordered that judgment will be entered for
the plaintiff in the sum of \$35,106.40. Of this
amount \$22,606.40 is the cost of a new well and the
balance, \$12,500.00, is for crop damages.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW SUBMITTED BY PLAINTIFF

I.

Defendants object to proposed Findings of Fact,
numbered I to XVIII, for the reason that the same
are not supported by the evidence.

II.

Defendants object to each of the proposed Con-
clusions of Law, numbered II, III, IV and V, for
the reason they do not, nor does any one or more of
them, contain a correct statement of the law ap-
plicable to the factual situation presented by the
evidence.

III.

Defendants respectfully request that the Findings of Fact and Conclusions of Law to be entered by the Court, under the evidence and the law thereunto applicable, be as follows:

Findings of Fact

I.

On November 17, 1954, defendants Elmer F. Shepard and Kathryn M. Shepard entered into an option to purchase agreement with Ernest Otto and Henry Haas. The option to purchase concerned certain land located in the State of Arizona, County of Maricopa, more particularly described as follows, to wit:

The North One-Half of Section 21, Township 1 North, Range 9 West, Gila and Salt River Base and Meridian.

II.

That said Otto and Haas had the opportunity to investigate said property and the chattels thereon and did, in fact, investigate the same, and thereafter entered into the option agreement aforesaid.

III.

That said Otto and Haas entered into said option agreement by virtue of their own investigation of the aforesaid real property and not by reason of any representations made to them by the defendants Shepard, or either of them.

IV.

That the value of the aforesaid real property at the time the option agreement was entered into was in excess of the purchase price paid by the plaintiff, who is the assignee of said Otto and Haas, and plaintiff has not been damaged.

Conclusions of Law

I.

The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

II.

The Federal Court is bound to follow the controlling rules of substantive law, as declared by state legislatures or the highest state courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal constitutional or statutory question is involved.

Erie Rr. Co. v. Tompkins,
58 Sup. Ct. 817, 304 U.S. 64, 82 Law Ed. 88.
New York Life Insurance Co. v. Rogers,
126 F. 2d 784 (CCA Ariz.).

III.

The measure of damages to be applied in this case is the difference between the real value of the property purchased and the value it was represented to be worth.

Lutfy v. R. D. Roper & Sons,
57 Ariz. 495, 115 P. 2d 161.

Wooley v. Locarnini,
18 Ariz. 539, 164 P. 319.

Curry v. Windsor,
22 Ariz. 108, 194 P. 958.

Ren v. Jones,
38 Ariz. 476, 1 P. 2d 110.

Hidalgo v. McCauley,
50 Ariz. 178, 70 P. 2d 443.

IV.

An action for fraud is a personal action, not assignable.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

V.

A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.

Nearpark Realty Corp. v. City Investing
Company, 112 N. Y. Supp. 2d 816.

Fox v. Hirschfield,
142 N. Y. Supp. 261.

Schwartz v. Durham, I.D.

VI.

Fraud is never presumed, but must be shown by clear and convincing evidence.

Cole v. Town of Miami,
53 Ariz. 234, 83 P. 2d 797.

VII.

Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman,
110 Cal. App. 2d 237, 242 P. 2d 94.

Law v. Sidney,
47 Ariz. 1, 53 P. 2d 64.

Respectfully submitted,

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—THURSDAY,
JANUARY 10, 1957

Honorable Dave W. Ling, United States District
Judge, Presiding.

It Is Ordered that Defendants' Objections to
Plaintiff's Proposed Findings of Fact and Con-

clusions of Law are overruled, and that Plaintiff's Proposed Findings of Fact and Conclusions of Law are approved and adopted as the Findings of Fact and Conclusions of Law herein and that the Clerk enter judgment in accordance therewith.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED FINDINGS
AND CONCLUSIONS

Findings of Fact

I.

Plaintiff is a corporation whose organization under the laws of California was completed on January 7, 1955. It was authorized to do business in Arizona on February 24, 1955. Each of defendants is a citizen and resident of Arizona. The amount in controversy in this action exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

On or about November 17, 1954, defendant Elmer F. Shepard made certain representations to one Ernest Otto and one Henry Haas regarding the condition of a well on the land described in Finding III which was owned by Shepard. At the time these representations were made, it was contemplated by

Otto and Haas and certain other residents of California to form plaintiff corporation in order to purchase the land in question from defendant Shepard. These facts were known to Shepard.

III.

The representations referred to in Finding II were made on the land which Otto and Haas, on behalf of plaintiff, contemplated buying from Shepard. This land is located in the State of Arizona, and is more particularly described as:

The North $\frac{1}{2}$ of Sec. 21, Township 1 North, Range 9 West, Gila & Salt River Base & Meridian.

IV.

The specific representations made by Shepard at that time and place were as follows:

(a) That it was Shepard's opinion that the well on the land would pump twenty-two hundred gallons of water per minute.

(b) That the pump had been pulled from the well on only two occasions; once due to a mistake on the part of the pump company, and once for the purpose of deepening the well.

(c) That the well was in good condition.

(d) That the well would run seventy-five two-inch siphon tubes for the purpose of irrigation.

V.

Both Otto and Haas inquired as to the dirty character of the water pumped from the well, but were told by Shepard that it always cleared up within a couple of hours after the well was turned on. Shepard made no further reference to the history of the well in this conversation or in any other conversation with Otto and Haas or with any other representative of the plaintiff other than that indicated in Finding IV.

VI.

Otto inspected the pump and well at the time of this conversation, but was prevented from learning the true condition of the well by virtue of the fact that the spout of the well had an elbow in it and a baffle had been welded into the elbow. The combined effect of the baffle and elbow gave an appearance of a considerably more flow of water from the spout than was actually the case.

VII.

Otto was an experienced California cotton farmer, but had had no acquaintance with deep water wells of the kind used in Arizona.

VIII.

Otto's formal education had ended with the tenth grade. Haas had had no experience with cotton farming or with wells of any sort. Otto estimated the output of the well at the time of this conversation as approximately two thousand gallons per minute, but

in so doing he was influenced by the deceptive effect of the baffle in the elbow of the spout.

IX.

Each of the representations described in Finding IV were false in the following regard:

(a) The pump at the time the representation was made, and for several months previous thereto had been incapable of pumping more than fifteen hundred gallons per minute. Shepard was aware of this and did not believe the pump would put out twenty-two hundred gallons per minute.

(b) The pump had actually been pulled four times in less than two years, and Shepard had spent over Twelve Thousand Dollars (\$12,000.00) in an effort to salvage what the man who drilled it described as a "bad well from the day it was drilled."

(c) The casing in the well was broken or collapsed at a point somewhere between four hundred feet and five hundred feet down.

(d) The well would not at the time of the conversation, nor for a period of several months before, run more than sixty two-inch tubes for the purpose of irrigation.

X.

Defendant Elmer Shepard knew that each of these representations were false.

XI.

Defendant Elmer Shepard intended that these

representations be acted upon by Otto and Haas, and by plaintiff which he knew at that time Otto and Haas contemplated forming.

XII.

Each of these representations was material to the transaction involved, since the presence or absence of water on the desert land in this area is the principal factor in fixing the value of the land.

XIII.

Neither Otto nor Haas, nor any other agent of the plaintiff at any time prior to the execution of the agreement described below knew of the falsity of these representations.

XIV.

Otto and Haas, in reliance on the truth of these representations, and in contemplation of forming a corporation to exercise the option, entered into an option agreement on November 17, 1954, with defendants Elmer and Kathryn Shepard whereby they obtained an option to purchase the land in question for the sum of Two Thousand Dollars (\$2,000.00).

XV.

On January 11, 1955, plaintiff, with the consent of Otto and Haas and of the Shepards, contracted in writing with the Shepards to purchase the land together with certain personal property for the sum of Eighty Thousand Dollars (\$80,000.00). Twenty

Thousand Dollars (\$20,000.00), (including Two Thousand Dollars (\$2,000.00) previously paid for the option) was paid then and the balance was to be paid over a period of years.

XVI.

Plaintiff, by its agent, Otto, went into possession of the land in March, 1955, and immediately commenced irrigating in preparation for a cotton crop. When first turned on, the pump in the well in question produced less than fifteen hundred gallons of water per minute, and thereafter its output constantly declined throughout the summer so that by September, 1955, it produced only two hundred and fifty gallons per minute. Otto, on behalf of plaintiff, sought and followed the advice of an expert well driller as to how best to conserve the well. In October, 1955, it was necessary to completely replace the well and drill a new one. Plaintiff expended the sum of Twenty-two Thousand Six Hundred Six and 40/100 Dollars (\$22,606.40) in drilling and equipping a new well. The expenditure of this sum was reasonably necessary to produce a well approximately equivalent in cost and production to that represented by Shepard as being on the property at the time of sale.

XVII.

Plaintiff's cotton crop was damaged by the lack of water directly resulting from the failure of the well. Plaintiff, by its agent, Otto, made reasonable efforts to get water elsewhere but was unsuccessful in so doing. The difference in the value at maturity

of the crop which would have resulted had the water supply been as represented, and that which actually did result, was Twelve Thousand Five Hundred Dollars (\$12,500.00).

XVIII.

Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas.

Conclusions of Law

1. This Court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332.

2. By reason of the fraudulent misrepresentation of defendant Elmer Shepard defendants are liable to plaintiff for the damages sustained by plaintiff which were proximately caused by said representations.

3. Under Arizona law, the measure of damages for fraudulent misrepresentation is the so-called "benefit of the bargain" rule, or the difference between the value as represented and the actual value. *Lutfy v. R. D. Roper & Sons*, 57 Ariz. 495, 115 P. 2d 161. In the situation of this case, a recognized alternative measure proceeding on the same theory is the reasonable cost of placing the property received in the condition in which it was represented to be. *McCormick on Damages*, Section 122, p. 154.

4. These damages amount to Thirty-five Thousand One Hundred Six and 40/100 Dollars (\$35,106.40).

5. Plaintiff is entitled to judgment against defendants in the amount of Thirty-five Thousand One Hundred Six and 40/100 Dollars (\$35,106.40).

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Proposed Findings, etc., endorsed, filed November 29, 1956.

[Endorsed]: Findings and Conclusions filed January 10, 1957.

[Title of District Court and Cause.]

DOCKET ENTRY

Jan. 10—Enter judgment in favor of the plaintiff, Cal-Nine Farms, a corporation, and against the defendants, Elmer F. Shepard and Kathryn M. Shepard, his wife, in the sum of \$35,106.40.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come Now the defendants, and each of them, and move the Court for an order vacating and setting aside the judgment of the Court in the above-entitled matter, which judgment was against the de-

defendants and in favor of the plaintiff, and was rendered on the 23rd day of November, 1956, and for an order granting judgment for the defendants, or in the alternative, for an order granting a new trial in said matter.

Said motion is made upon the following grounds:

1. For errors of law occurring at the trial and during the progress of the cause;
2. That the judgment is not justified or supported by the evidence;
3. That the judgment is contrary to law;
4. That the Court erred in admitting evidence offered by the plaintiff;
5. That the Court erred in rejecting evidence offered by the defendants;
6. That the Court erred in rendering judgment against the defendants and in favor of the plaintiff;
7. That the Court erred in overruling and denying these defendants' objections to jurisdiction;
8. That the Court erred in failing to apply the proper measure of damages; and
9. That there is no sufficient or substantial evidence tending to support the amount of the judgment.

Dated at Phoenix, Arizona, this day of January, 1957.

KRAMER, ROCHE & PERRY,
Attorneys for Defendants.

Memorandum of Points and Authorities

1. Federal Rules of Civil Procedure, Rule 59, authorizes the Court to grant a new trial, or, in the alternative, to correct the judgment and direct the entry of the new judgment.

2. In support of Motions 1, 3, 4, 5, 6, 7 and 8, the defendants cite to the Court the following propositions of law and cases supporting the same:

(a) An action for fraud is a personal action, not assignable.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

(b) A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.

Nearpark Realty Corporation v. City Investing Company, 112 N. Y. S. 2d 816.

Fox v. Hirschfield,
142 N. Y. S. 261.

Schwartz v. Durham, *id.*

Houston v. Ohio & Colorado S & R Co.,
63 Colo. 152, 165 P. 251.

(c) Fraud is never presumed, but must be shown by clear and convincing evidence.

Cole v. Town of Miami,
53 Ariz. 234, 83 P. 2d 797.

Wood v. Ford,

50 Ariz. 536, 72 P. 2d 423 (Elements of Fraud).

(d) Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman,

110 Cal. App. 2d, 237, 242 P. 2d 94.

Law v. Sidney,

47 Ariz. 1, 53 P. 2d 64.

(e) The measure of damages sustained by the purchaser where a purchase has been induced by fraud is the difference between the real value of the property purchased and the value which it would have had, had the representations been true.

Lutfy v. R. D. Roper & Sons,

57 Ariz. 495, 115 P. 2d 161.

Wooley v. Locarnini,

18 Ariz. 539, 164 P. 319.

Curry v. Windsor,

22 Ariz. 108, 194 P. 958.

Ren v. Jones,

38 Ariz. 476, 1 P. 2d 110.

Hidalgo v. McCauley,

50 Ariz. 178, 70 P. 2d 443.

In connection with the above authorities, it is pointed out to the Court that in the case of *Wooley v. Locarnini*, cited above, the jury found that the land sold was in fact worth more at the time of sale than the purchaser had paid for it, and took this fact into consideration in determining damages, and reduced the damages because of said finding. That is precisely the position defendants have maintained in regard to alleged damages in this case. There was testimony by Shepard that the land was worth at the time of sale, at least the purchase price, and possibly more. Therefore, plaintiff could not be damaged.

The case of *Ren v. Jones*, cited above, stands for the proposition that repairs made to property as much as a year after purchase are not material and have no bearing on the measure of damages. This point goes directly to the judgment of the Court granting \$22,606.40 for the cost of a new well, which defendants contend is error, since it constitutes awarding damages on the basis of cost of repair.

Defendants feel the Court erred therefore in the determination of damages and in refusing to allow cross-examination of the witness, Cameron, in regard to the value of the property at the time of sale. Defendants also maintain that the Court erred in taking evidence on the part of plaintiff as to the cost of drilling a new well, as this did not constitute the measure of damages under the Arizona cases.

(f) The Federal Court is bound to follow the controlling rules of substantive law, as declared by

State Legislatures or the highest State Courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal, constitutional or statutory question is involved.

Erie R. Co. v. Tompkins,

58 Sup. Ct. 817, 304 U. S. 64, 82 L. Ed. 88.

New York Life Ins. Co. v. Rogers,

126 F. 2d 784 (C.C.A., Ariz.).

Defendants contend that under the *Erie v. Tompkins* rule above, the Court is bound to follow the Arizona rule on measure of damages, fraud, parties plaintiff, and sufficiency of evidence. It is submitted, the Court did not follow these rules as set out by the Arizona Supreme Court and that failure to do so was reversible error which entitles defendants to a judgment in their favor, or a new trial.

Defendants wish to point out to the Court that under the Arizona rule for measure of damages, as cited above, the action of the Court in awarding a money judgment is error under the cases cited in paragraph (c) above, since plaintiff still owes money to defendants for the purchase of the property in question.

3. In support of Motions 2 and 9 defendants cite the following propositions of law and supporting cases:

(a) Plaintiff must prove all the elements of actionable fraud, to wit:

1. A representation;
2. Its falsity;
3. Its materiality;
4. The speaker's knowledge of its falsity or ignorance of its truth;
5. His intent that it should be acted upon in the manner reasonably contemplated;
6. The hearer's ignorance of its falsity;
7. His reliance upon its truth;
8. His right to rely thereon; and
9. His consequent and proximate injury.

Stewart v. Phoenix National Bank,
64 P. 2d 101, 49 Ariz. 34.

Sims Printing Company v. Kirby,
106 P. 2d 197, 56 Ariz. 130.

Wilson v. Byrd,
79 Ariz. 302, 288 P. 2d 1079 (Re: Right to
rely).

Beville v. Allen,
237 P. 184, 28 Ariz. 397 (Re: Growing
crops).

(b) Where it fairly appears from evidence that a buyer undertook to investigate for himself matters as to which representations had been made, he cannot later claim that he acted upon the representations.

The following cases hold that in fraud cases, the purchaser who has undertaken to make an inspection is not limited to doing the things he may find

to be convenient. If he neglects to discover conditions before him from failing to examine what was available for examination, he cannot deny knowledge of defects which existed. These cases also hold that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more representations, he is under a legal duty to make a complete investigation and may not rely upon statements of the seller.

Carpenter v. Hamilton,

18 Cal. App. 2d 69, 62 P. 2d 1397, 1401.

Gratz v. Schuler, *supra*,

12 Cal. Jur. Sec. 37, p. 763.

Gifford v. Roberts (Cal. App.),

184 P. 2d 942, 945.

Podlasky v. Price (Cal. App.),

196 P. 2d 608, 614.

Cameron v. Cameron (Cal. App.),

199 P. 2d 443, 447.

Defendants also refer the Court to paragraphs 2(c), 2(d) and 2(e), hereinabove referred to, as additional authority.

Respectfully submitted,

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,

Attorneys for Defendants.

[Title of District Court and Cause.]

NOTICE OF HEARING MOTION
FOR NEW TRIAL

To: Cal-Nine Farms, a corporation, plaintiff, and
to Ragan & Rehnquist, its attorneys:

You, and Each of You, Will Please Take Notice that the undersigned will call up the Motion for a New Trial, heretofore filed in the above-numbered and captioned cause, on Monday, the 28th day of January, 1957, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in the Courtroom of the above-entitled Court, at which time and place you may appear and take such part as you deem fit.

Dated at Phoenix, Arizona, this 14th day of January, 1957.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,

Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY—FRIDAY, MARCH 1, 1957

Honorable Dave W. Ling, United States District
Judge, Presiding.

It Is Ordered that Defendants' Motion for New
Trial is denied.

(Docketed March 1, 1957.)

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF APPEAL

Notice Is Hereby Given that the defendants above
named hereby appeal to the United States Court
of Appeals for the Ninth Circuit from the Judgment
of the United States District Court for the
District of Arizona, rendered and entered on the
10th day of January, 1957, in the above-entitled
cause, and from the whole of said judgment and
from the order of said District Court entered March
1, 1957, denying the defendants' motion for a new
trial.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,

Attorneys for Defendants.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE IN APPELLATE COURT

Upon motion of Defendants-Appellants, good cause appearing therefor,

It Is Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 20th day of June, 1957.

Dated this 15th day of April, 1957.

/s/ DAVE W. LING,
District Judge.

[Endorsed]: Filed April 15, 1957.

In the District Court of the United States
for the District of Arizona

Civ. 2343—Phx.

CAL-NINE FARMS,

Plaintiff,

vs.

ELMER F. SHEPARD and KATHRYN M.
SHEPARD, His Wife,

Defendants.

DEPOSITION OF ELMER F. SHEPARD

Be It Remembered that the deposition of Elmer F. Shepard, a defendant herein, was taken pursuant

to stipulation before H. R. Larson, a Notary Public in and for the County of Maricopa, State of Arizona, on the 2nd day of February, 1956, commencing at the hour of 3:30 o'clock p.m., at the offices of Messrs. Kramer, Roche & Perry, First National Bank Building, Phoenix, Arizona.

The plaintiff was represented by its attorneys, Messrs. Ragan & Rehnquist, and the defendants were represented by their attorneys, Messrs. Kramer, Roche & Perry, by Mr. Frank Haze [1*] Burch.

The following proceedings were had:

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, through their respective attorneys, that the deposition of Elmer F. Shepard, a defendant herein, may be taken upon cross-examination as an adverse party by the plaintiff before H. R. Larson, a Notary Public in and for the County of Maricopa, State of Arizona, at the time and place heretofore noted.

It Is Further Stipulated that all objections except as to the form of the questions propounded are reserved until the time of trial.

It Is Further Stipulated that the witness may read and sign the deposition at the end thereof, and that the requirements of the statutes relating to return of and notice of filing of said deposition are waived.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

ELMER F. SHEPARD

being first duly sworn by the Notary, testified as follows: [2]

Cross-Examination

By Mr. Rehnquist:

Q. State your name, please.

A. Elmer Francis Shepard.

Q. You are one of the defendants in this action?

A. Yes.

Q. The husband of Kathryn M. Shepard?

A. Yes; that is right.

Q. Where do you live? A. Liberty.

Q. Is that near Buckeye?

A. About three miles east.

Q. How long have you lived there?

A. In this particular house or in that area?

Q. In that area. A. 37 years.

Q. Did you, immediately prior to January, 1955, own a parcel of land in the Harqua Hala Valley designated as the north half of Section 21, Township 1 North, Range 9 East? A. No; 9 west.

Q. I am sorry, 9 west. And that is the land that has been discussed and described in the examination of Mr. Otto? [3] A. That is right.

Q. When did you purchase this land?

A. I am not sure. I believe in 1952.

Q. Did it have a well on it then?

A. No; it was raw desert.

Q. You purchased it as raw land?

A. Yes.

Q. Did you put a well in? A. I did.

(Deposition of Elmer F. Shepard.)

Q. Did you farm it?

A. Which well are you speaking of, the one that collapsed?

Q. Did you farm the land? A. Yes.

Q. How many years did you farm it?

A. Well, let's see, before Mr. Otto bought it?

Q. Yes. A. Two years.

Q. Two years. That would have been 1953 and 1954? A. Yes.

Q. Have you owned other land in the Buckeye area? A. Yes.

Q. Have you farmed any other land in the [4] Buckeye area? A. Yes.

Q. Over how long a period of time?

A. Oh, probably 13 or 14 years.

Q. Have you sold within the past, say, ten years any land other than the land here in question in the Buckeye area? A. No; I don't believe so.

Q. Have you bought any other land out there within the last ten years?

A. Out in Harqua Hala?

Q. In Harqua Hala or the Buckeye area?

A. Yes; I have bought other ground.

Q. Would you describe the land in the Harqua Hala Valley as desert land? A. Yes.

Q. Some water supply is necessary to successfully farm it? A. That is right.

Q. Calling your attention to the year 1954, what would you say the price of raw desert land in the Harqua Hala Valley was in that year?

A. In 1954, well, I sold some for \$50 an acre.

(Deposition of Elmer F. Shepard.)

Q. Did you regard that as a fair price?

A. I thought it was. [5]

Q. What is the price of such land today?

A. Of raw ground?

Q. Yes.

A. I paid \$125 an acre for some raw land there. It depends on the area. Anywhere from \$20 I would say to \$125.

Q. Again calling your attention back to the year 1954, what was the price per acre of the land in the Harqua Hala Valley which had a proven well on it?

A. In 1954, it depended on the ranch and different factors, improvements.

Q. What would the range of prices be?

A. Oh, I would say anywhere from \$250 to \$450.

Q. Per acre, that is?

A. Yes; right in that immediate area.

Q. And, if because of a fault underground, or some other geological formation, it was known no successful well could be put down on the land, what would that kind of land sell for, if you know?

A. Well, I don't know.

Q. Do you think such land would be worth much?

Mr. Burch: We will object to that—oh, go ahead and answer if you know. [6]

A. I don't know, that is beyond me.

Q. (By Mr. Rehnquist): Would you say the availability of water on this land is a pretty vital factor in its price? A. I don't know.

(Deposition of Elmer F. Shepard.)

Q. You don't know whether water is important in pricing that land?

A. Well, yes; it has a bearing on the value of the ground, I imagine, several factors. It would be the improvements on the property, and the type of ground, whether it was the type of soil that—

Q. Would you say water was an important factor? A. Oh, yes.

Q. Do you remember what you paid for the land that you later sold to Mr. Otto?

A. Very well. I was one of the first in that area. I bought it in an unimproved district for \$20 an acre.

Q. Did you place any improvements on the land?

A. Yes.

Q. You said you did drill the well on it?

A. Yes.

Q. Was your first well a success? [7]

A. No; the casing was ripped and it was—with the cable tool and it collapsed.

Q. Did you drill another well? A. Yes.

Q. That was the well that you showed to Mr. Otto when he came out to see about purchasing your land? A. That is the one Mr. Otto saw.

Q. When was that well drilled, if you remember? A. I don't remember.

Q. Do you remember the year in which it was drilled?

A. I believe it was in 1953. I couldn't be sure.

Q. Do you remember how long after you bought the property it was drilled?

(Deposition of Elmer F. Shepard.)

A. No; I don't. I would have to look it up.

Q. Who drilled your second well for you?

A. Gordon Cameron.

Q. Is he a good friend of yours?

A. A very good friend.

Q. Do you know what depth he went to on that second well?

A. The first depth was 1,033, cased.

Q. Do you know the gallonage that this well put out immediately after it was drilled? [8]

A. No; that would be hard to estimate.

Q. What did you do by way of maintenance and upkeep on this well?

A. What do you mean, on the equipment or the well?

Q. First, let us take the equipment.

A. Well, the engine and the equipment was checked every two weeks during the pumping season by State Tractor, and kept in good repair at all times, points, plugs, anything it happened to need.

Q. That continued up to the time you sold the land to Mr. Otto?

A. That is right. I have statements to show.

Q. You have statements covering that service?

A. Yes.

Q. Did you pack the well with gravel?

A. Yes.

Q. How often?

A. Well, I don't think you understand a gravel

(Deposition of Elmer F. Shepard.)

packed well. Whenever it is drilled, it is gravel packed, and a gravel chute is put in the well bed, that is, concrete around the casing, and if the well should displace the material below, then it takes more gravel, it takes gravel, and you put it in the gravel chute. [9]

Q. So there is no regular period in which you pack a well? A. No.

Q. Have you any idea how often it would run in your well?

A. I don't know. I put two loads. I don't know how many tons that would be, that I put in the well, and it was apparently filled because it didn't take any more.

Q. And did you at the time of the sale to Mr. Otto believe that the well was sufficiently packed with gravel? A. That is right.

Q. Why did you believe that?

A. Because it wouldn't take any more, and I don't think he was able to put any more in it.

Q. Do you regard yourself as having adequately maintained the well both as to gravel pack and machinery?

A. I did everything possible to keep it in running order.

Q. Did you ever have any trouble with your well after it was put in?

A. What kind of trouble do you mean? With the equipment or the well?

Q. First, let's take the well. Let's take [10] the hole.

(Deposition of Elmer F. Shepard.)

A. Well, as everybody knows in that area there was some silt. Gordon has a well that throws some silt. There is wells all over the state that does that. So he thought maybe by increasing the capacity, and getting it away from that, I could deepen the well, so I deepened it to 1,375 feet.

Q. Do you remember when that was approximately?

A. Well, it was about a year before Mr. Otto bought the place.

Q. That would be then right around the beginning of 1954?

A. Yes; it was before that bedding season, the cotton crop.

Q. And who deepened it for you at that time?

A. Gordon Cameron.

Q. Did you know the gallonage output of the well before he deepened it? A. No.

Q. What did Gordon Cameron do to the well?

A. Like I say, he deepened it to 1,375 feet. He couldn't get his mud to circulate. There seemed to be such a tremendous amount of water underground he couldn't get circulation on the [11] mud, so he wet drilled it, water drilled it, 1,375 feet.

Q. Did he report any difficulty in getting it down, to you?

A. There was some slight something or other that held the bit for a little while; he said it could have been an egg-shape in the casing when it was unloaded from the truck. That was his report to me, and he went from that size bit to one under

(Deposition of Elmer F. Shepard.)

that size, and it went down perfectly without any trouble whatsoever.

Q. Do you remember the size bit involved?

A. He tried a 15, I think. I think he went to a 12 and three-quarters. I wouldn't state that as a fact. I gave him the job; he was to do the job and he did it. I did not care what size bit he put in it.

Q. He didn't report this to you as a serious obstruction? A. No; nothing serious.

Q. Did he tell you what depth that was?

A. Well, I did know about. I don't remember.

Q. Was this the only time you had any trouble with the well, as opposed to the machinery?

A. The only trouble I had with the well. You couldn't classify that as trouble. He could. [12] have put a 9-inch bit in there as far as I was concerned. I just wanted the well deepened.

Q. There was no other occasion during the time between when you had the well drilled and the time you sold the land, that you had Gordon Cameron or any other well driller back?

A. No. The equipment was put back in. The crop was grown on the land, and a minute ago when he mentioned that I used water from Gordon, it was ten days' time, and they thought it was in the pump, and they pulled the pump, and it wasn't the pump, and they found it was the gas pressure on the engine, and it took about two turns with a screwdriver to put it back in shape.

Q. That was a different time than this deepening? A. Yes.

(Deposition of Elmer F. Shepard.)

Q. When was that, do you remember?

A. That was along in either July or August, I don't remember which.

Q. And you pulled the pump at that time?

A. Yes.

Q. And what again was the trouble?

A. The trouble was in the gas pressure on the engine. It was their mistake, but I paid for it. [13]

Q. Who pulled the pump for you?

A. The State Tractor.

Q. It was during that time you used Gordon's water?

A. Yes; one of the times. One other time when we had some trouble—no; that was the time.

Q. So those were the only two times you had anything that might be called trouble either with the well or with the machinery?

A. Well, other than something minor with the engine. There was one time—or the pump. There was one time that the—I will show you on this diagram. This nut right here——

Mr. Rehnquist: I think we might do better to identify this, Mr. Shepard. Would you like to make reference to this in your explanation?

A. Yes.

Mr. Rehnquist: If so, may we call this Exhibit A?

(The document referred to was marked Plaintiff's Exhibit A by the Notary.)

Q. (By Mr. Rehnquist): Would you continue with your description?

(Deposition of Elmer F. Shepard.)

A. This particular nut right here, I guess it would be the shaft tube tension nut.

Q. As shown on the exhibit? [14]

A. As shown right here, vibrates or something, causing it to slip, and it was replaced, which takes time during a busy season. If they are on some other job, it takes a few days for them to get to it.

Q. Did your well have an elbow spout on at the time you sold it to Mr. Otto?

A. A bonnet down turn. It is an elbow, I guess you would call it. We call it a bonnet.

Q. And was that put on at the time the well was drilled?

A. It was put on at the time I believe when it was—I couldn't say, either, when it was drilled or when it was deepened.

Q. It could have been put on when it was deepened, is that correct?

A. Yes; which was the year before Mr. Otto bought it.

Q. Did you have welded inside the spout some sort of a flange?

A. Did I have welded? Did I cause to have it welded?

Q. Did you cause to have welded? A. No.

Q. Was there such a flange inside?

A. Yes. [15]

Q. How did it get there?

A. The man that put the bonnet on it put it in.

Q. Who was the man that put the bonnet on?

A. Ernest Woods.

(Deposition of Elmer F. Shepard.)

Q. Ernest Woods? A. Yes.

Q. Is he referred to as Woody?

A. Yes; I think so.

Q. When was that, do you know, at the same time the bonnet?

A. I think when the bonnet was put on it.

Q. What was the purpose of that flange?

A. To hold back pressure, a certain amount of back pressure on the cooling system, water exchanger.

Q. Is that a common practice in that kind of well?

A. Well, there is different ways. That was their method, his method.

Q. You didn't suggest it to him?

A. I never suggested it; no.

Q. To your knowledge has that been done on other wells in Harqua Hala Valley?

A. Well, there is a butterfly in most of those wells to force the water in an overhead pipe. [16] They have the 10-inch, like on Gordon's. I don't know what that is on there for unless for that reason, and then over on the Stall place they have a pipe that goes up, causes back pressure on the cooling system.

Q. Does that flange give the impression of more water coming out of the spout than would be given if there weren't any flange in it?

A. I don't know. I wouldn't know.

Q. You knew that the flange was put on at the time it was put on?

(Deposition of Elmer F. Shepard.)

A. No; at the time it was put on, no.

Q. When did you discover it?

A. Oh, some time later. I noticed they had put in the thing. I didn't pay any attention to it. I had a man running the pump for me, taking care of it, and whatever method he saw fit to use, to perform any certain part of the operation, was all right with me.

Q. How did this flange first come to your attention?

A. Well, I think he mentioned one day he put it in there. He didn't have to use quite as much pressure on his butterfly.

Q. Do you recall when that was that he mentioned it to you? [17] A. No.

Q. You knew that it was there at the time you were talking to Mr. Otto about the sale?

A. Oh, yes; it was there 60 days after we bought the place. I made no attempt to take it out.

Q. You knew it was there at the time you were talking to Mr. Otto? A. Oh, yes.

Q. Did you raise cotton on this land?

A. Yes.

Q. In '53? A. Yes.

Q. And in '54? A. Yes.

Q. Is there any ratio of gallons per minute to acres of cotton that is considered necessary for a cotton crop?

A. No; I think that is mostly up to the individual.

(Deposition of Elmer F. Shepard.)

Q. Is there any minimum below which you couldn't go?

A. Well, I wouldn't say. I just don't know about things like that. The rainfall, you would have to consider the rainfall, and the type of ground. A lot of people get by and grow quite a few acres on an 8-inch well. [18]

Q. On this particular land, would you make any estimate?

A. Well, the same well that he was using, I finished 211 acres of cotton with it the year before.

Q. That was 1954? A. Yes; '54.

Q. How many bales per acre did you get that year, Mr. Shepard?

A. I couldn't say exactly, but I think it was close to 2 bales.

Q. Where did you have that ginned?

A. The Acme Gin. I would have to check that. I couldn't say definitely, make a definite statement.

Q. You are sure it was ginned at the Acme Gin?

A. I am sure of that, but I mean the number of bales.

Q. Do you remember how many bales per acre you got in '53?

A. No; not exactly. I think it averaged around three-quarters of a bale the first year.

Q. Three-quarters of a bale the first year?

A. Yes.

Q. Did you have any trouble with insects [19] your first year? A. No more than normal.

(Deposition of Elmer F. Shepard.)

Q. Any trouble with root rot or any other disease?

A. Root rot, what do you mean by "root rot"?

Q. Well, being a city boy, maybe I am off on the wrong track. Is there a disease called root rot?

A. We didn't have it out there. They may have it in Texas, but not out there.

Q. Did you have any sort of disease of the plants? A. No.

Q. You are acquainted with Mr. Otto here?

A. Yes.

Q. And was he a party to an option agreement concerning your parcel of land? A. He was.

Q. When did you first meet him?

A. Well, I don't know; I don't remember.

Q. Was it in 1954? A. I believe it was.

Q. What was the occasion on which you first met him, do you remember that?

A. I think I was moving some cattle, doing [20] something on horseback, and he was picking cotton; the machine was going on the neighbor's place.

Q. It was during the cotton picking season?

A. Yes; during stub season; not the planted. The planted had not started the harvest yet. It was still being watered. I was still running water on my place when I met Mr. Otto picking stub on the neighbor's.

Q. Did you have any conversation at that time about buying or selling land in the Harqua Hala Valley?

(Deposition of Elmer F. Shepard.)

A. I believe that is the time he mentioned to me he wanted to buy a place in that country.

Q. Did you offer to sell him your land then?

A. No, sir.

Q. Did you tell him you were interested in selling?

A. No; I believe—I don't know whether that was the time, or some time later; he asked me if I would sell it and what I wanted for it, and I told him what I had had it priced at; that I was undecided whether to sell it or not.

Q. What did you tell him you had it priced at?

A. \$250. [21]

Q. That would make a total of \$80,000?

A. \$80,000.

Q. Did he later come to see you about purchasing this land?

A. Yes; quite some time later.

Q. Would that have been in November, 1954?

A. You have got me on those dates because I can't remember.

Q. Would it have been in the fall of 1954?

A. I believe it was.

Q. Was he accompanied by anyone at that time?

A. When he approached me on the sale of it?

Q. Yes.

A. At that particular time I think Mr. Haas was with him.

Q. And was this at your ranch that this meeting took place?

A. Well, now, I have heard that a minute ago.

(Deposition of Elmer F. Shepard.)

I don't remember whether it was at the ranch or inside.

Q. When you say inside, what do you mean?

A. Home, at Buckeye.

Q. It could have been on the place, as you remember it?

A. It could have been on the place.

Q. Was anyone with you at the time of this [22] conversation?

A. That is something else I can't remember because I attached no significance to it. There was hardly any discussion on it whatsoever. The man that worked for me could have been there. I don't remember.

Q. You don't remember him being there, being definitely present while you were talking?

A. No; not at that particular time.

Q. Did you know at that time Mr. Otto was from California? A. Yes.

Q. Did you know Mr. Haas was from California? A. Yes.

Q. And at this time they told you they were interested in buying the land?

A. I presume that is what he was over here for, to buy it.

Q. Did they actually tell you they were interested in buying it? A. Yes.

Q. Did you discuss the price? A. Yes.

Q. And did you again quote to them \$250 an acre?

(Deposition of Elmer F. Shepard.)

A. Well, I don't know whether I did at that [23] time or not.

Q. Did either Mr. Otto or Mr. Haas make any inquiry about the well on the land?

A. Yes. There was something said about it; asked me what production—what the well would produce, and I did, I told them that Jules Turner estimated it maybe would throw 2,400 gallons. I did not think it was that heavy. I did not know but what it would be nearer 2,200 gallons; that it was strictly an estimate. I told him I could be more of a judge—the well had never been measured—I could be more of a judge of the tubes it would run, and it would run 70 tubes.

Q. You told him the well would run 70 tubes?

A. That is right, and it would run 70 tubes slow, very slow, or 55 with a pretty good head of water. It depended on——

Q. Is there a correspondence on the number of tubes a well will run and its gallonage?

A. You can make the tubes run any amount you want to.

Q. Suppose the tubes are running slowly—supposing you assume you have 55 tubes running slowly, would that suggest to you a certain gallon output of that well?

A. No; not necessarily. You can take—it [24] depends on the pressure, the way you place them in the ditch, and the height of the ditch bank, and several different things.

Q. If you made all those factors uniform so that

(Deposition of Elmer F. Shepard.)

you knew exactly what you are talking about as to the position of the tubes and speed of the water, it would correspond to some gallon output, wouldn't it?

A. Well, I wouldn't say. I don't know.

Q. When you told Mr. Otto it ran 70 tubes, that didn't suggest to you any gallon output from the well?

A. Not necessarily. I was leaving it up to him to judge because I had never had the well measured, and it was beyond me, what it would throw, and he could—if he could judge by the number of tubes, I was willing for him to judge it that way.

Q. You never measured the gallon output of the well?

A. No; it has never been measured.

Q. At any time that you have had it?

A. No, sir.

Q. How would you go about measuring it if you wanted to?

A. I would not know how to measure it without [25] a weir box.

Q. You could do it with a weir box?

A. You would have to have a weir box. I wouldn't know exactly how to do that. It would take somebody acquainted with that sort of thing to measure it.

Q. You wouldn't know how to do it even with a weir box? A. No.

Q. And it wasn't a common practice in the valley to actually measure the gallon output?

(Deposition of Elmer F. Shepard.)

A. I don't think there has been a well out there officially measured?

Q. It is all based on estimation?

A. That is more or less——

Q. And one of the bases for an estimate is the number of siphon tubes it will fill?

A. That may be one way; some people judge it that way.

Q. You say you judged the well to be putting out 2,200 gallons? A. Approximately.

Q. How did you form that judgment?

A. Probably the same way that he come to the conclusion it was throwing 2,000. It was my judgment. [26]

Q. What was it based on?

A. Well, the water in the ditch, running water in the ditch.

Q. Not the number of siphon tubes?

A. That could have a bearing on it.

Q. Did it have a bearing on it?

A. Well, I wouldn't know. I imagine it would to a certain extent. The number of siphon tubes would indicate whether—to some extent what kind of well you had. If you had one running 120 tubes you could figure pretty well it was throwing better than 2,000 gallons, way better. It could throw possibly better than 3,000.

Q. If 120 tubes meant better than 3,000, 70 tubes would mean some sort of gallonage?

A. Well, yes.

Q. What gallonage would that mean?

(Deposition of Elmer F. Shepard.)

Mr. Burch: If you can arrive at an estimate.

A. The 70 tubes, well, I couldn't say.

Q. (By Mr. Rehnquist): You could say 120 tubes would mean more than 3,000, but you won't say anything about 70 tubes, is that right?

A. I would say probably 70 tubes would throw better than 2,000, to get right down to it. I don't know, I am not a water expert.

Q. I show you a copy of a document, option [27] to purchase, marked Exhibit A in your answer. Did you sign that agreement? That is just the copy there, it wouldn't show your signature, but did you sign an agreement like this, of which that is a copy?

A. I would have to read it completely to tell.

Q. Well, now, Mr. Shepard, you in your answer said that you signed an agreement like that; you have attached it to your answer.

A. I have signed an agreement. Yes, I believe this is it.

Q. And did you sign it on the date that is indicated there, or somewhere around that date, the 17th day of November, 1954?

A. Yes, I believe so.

Q. Did you know on or around that date the approximate capacity of the well on your property?

A. On this particular date here?

Q. On or around there?

A. I suppose it was the same as when I finished the irrigation along in September.

Q. The question was, did you know at or around that date the approximate capacity?

(Deposition of Elmer F. Shepard.)

A. Approximate, I imagine so.

Q. And what was that capacity? [28]

A. Approximately probably 2,000 gallons or better.

Q. Can you say definitely it was 2,200?

A. No, I cannot say it was definitely 2,200 because the well was never measured.

Q. What would be your best estimate as to its capacity at that time?

Mr. Burch: If you know what it was at that time.

A. Well, I don't know.

Q. (By Mr. Rehnquist): In other words, you did not know the capacity of the well?

A. Not definitely, no.

Q. The question was "approximately."

A. Probably 2,200 gallons.

Q. Did you know on or around that date whether or not the gallonage pumped by the well was remaining constant?

A. Not at this date. The well wasn't running at this date. The well was cut down in September. When the well was cut off it was pumping the same as it had when the well was started, when it was deepened one year before.

Q. At that time when the well was cut off you had no reason to think the gallonage was decreasing? [29]

A. No reason, I couldn't see any reason why it would.

Q. And there was nothing that came to your at-

(Deposition of Elmer F. Shepard.)

tention between the time the well was cut off and the time of these conversations with Mr. Otto and Mr. Haas that would lead you to believe that the gallonage was decreasing? A. No.

Q. Did you regard the well to be in good condition at that time? A. Yes.

Q. Did you tell Mr. Otto and Mr. Haas that the well was in good condition?

A. No, that was never brought up.

Q. The only thing that was brought up was the estimate as to the gallonage output?

A. That is right.

Q. Did you believe it to be in good condition at this time? A. Yes, I did.

Q. After the execution of the option agreement on or about November 17th, did you have any further conversation with Mr. Otto or Mr. Haas regarding the land or the well? A. After——

Q. Say between that time and the escrow [30] instructions. A. Concerning the well?

Q. Concerning the well.

A. Between this time and the escrow instructions, no.

Q. Concerning the land in general, wasn't there some reference to—or a discussion of the cotton acreage allotment?

A. Oh, yes, it was not discussed; he was trying to get me to let some of my cotton land from the place inside, to go with it, but I refused.

Q. You have another place at Buckeye?

A. Yes.

(Deposition of Elmer F. Shepard.)

Q. Does your father have any land there?

A. Yes.

Q. Is that in the Harqua Hala Valley?

A. He has some in Harqua Hala and some at Buckeye.

Q. Did you know at the time you were negotiating the option agreement that Mr. Otto and Mr. Haas had incorporated or were going to incorporate if they decided to buy the land?

A. At the time of the option?

Q. Yes.

A. Well, Mr. Otto was—no, not at that [31] time. When they signed I knew it then, but not when we were talking the first time.

Q. But when the option agreement was signed you knew it?

A. Yes, Haas—it was rumored he was to have an interest in it.

Q. You had no objection to the corporation taking up the option given to Otto and Haas as the terms were complied with?

A. No, I don't see why I should.

Q. And you did not have? A. No.

Q. Was there any discussion at the time of signing the escrow instructions in January regarding the condition of the well, or presence of water on the land? A. No.

Q. Was there any discussion at that time at all about the land or the well?

A. I don't remember now except that when it went into escrow they were still trying to get some

(Deposition of Elmer F. Shepard.)

of the cotton base from inside. I did let them have almost 11 acres of hardship cotton that my place inside wouldn't receive, that I let go with that place. I would have lost it, and they could gain it. [32]

Q. Then all during the time on negotiations leading up to the sale there were no discussions as to the condition of the well other than what you have told me about?

A. Not that I can remember.

Q. Would you say your asking price for the land, that is, \$250 an acre, was set on the basis of a well in good condition?

A. \$250, set on a well that was in good condition? Ground sells at most any price. It could have been the type of ground, and the levelness of the place, several factors involve and influence the price per acre.

Q. Do you think if the well had been known to be caved in and a new well would have to be drilled, you could have gotten \$250 an acre for the land?

A. If it had been known?

Q. Right. A. Well, I don't know.

Q. Don't you think there is some probability you might not have been able to get \$250 for the land if the people buying it knew they were going to have to drill a completely new well?

A. Possibly, yes. There was \$23,000 worth of equipment in the hole. There was half a [33] section of perfectly level ground. \$6,000 gas line into it. I don't think that was an unreasonable price.

(Deposition of Elmer F. Shepard.)

Q. It wouldn't have been an unreasonable price even though the well were completely useless?

A. It depends on how bad they wanted the ground, who wants it and what they are paying for ground.

Q. Are you acquainted with the land of Gordon Cameron next to the land in question?

A. Yes.

Q. What is his principal crop? A. Cotton.

Q. Do most of the farms in the area raise cotton?

A. If they have the base, they do.

Q. And were you acquainted with the fact that Cal-Nine—Mr. Otto and Mr. Haas were going to raise cotton?

A. I knew—I think they would have been foolish if they didn't grow cotton. The place had a base on it.

Q. Did you believe they were going to raise cotton?

A. I had every reason to believe they were.

Q. Then there is no doubt in your mind it [34] is essential for a cotton crop to have an adequate supply of water during August and September?

A. Yes, I think—yes.

Q. Would you say there is no necessary correspondence between acres of cotton and gallons that is necessary?

A. No two people farm alike. One man might utilize his tail water and farm several more acres than his neighbor.

Q. You don't think there is any minimum set?

(Deposition of Elmer F. Shepard.)

A. I wouldn't want to state it. There is possibly, but I wouldn't know what it would be.

Q. You did not know after Mr. Cameron finished deepening the well around the beginning of 1954, that there was a serious obstruction or break in your well at about 500 feet?

A. A serious obstruction or break?

Q. Right. A. No.

Q. In that part of the well that was deepened by Mr. Cameron in 1954, was there any casing put down for the deepened part?

A. No, the casing was 1,033, and it was deepened from that point down—that is a common practice on lots of wells, is to case the top part and leave the bottom part open. [35]

Q. Isn't that pretty much of a temporary source of water when you go down without casing?

A. I wouldn't say that it is. There is a number of wells in the state that has no casing in them whatever, that are pumping.

Q. There are some wells in the Harqua Hala Valley of that nature?

A. They have some uncased portion of the holes. One next to me, the neighbor south of me, I think has possibly 100 feet uncased on the bottom.

Q. And that would be expected to run indefinitely without filling up?

A. I wouldn't know what you would expect from it. That is out of sight and——

Q. Would you expect an uncased well to fill up sooner than a cased well?

(Deposition of Elmer F. Shepard.)

A. Probably up to the point of the casing.

Q. How long would you say it would take, would you give any estimate?

A. I have no idea. That is clear over my head, and there is no engineer in the state that could answer a question like that, a geologist or otherwise.

Q. Mr. Shepard, did you tell Mr. Otto that part of your well was uncased? [36]

A. He never asked me. It was still my well up until I sold it. You understand this happened a year before.

Q. You didn't feel it was necessary to tell him part of it was uncased?

A. There is a log that is filed with the State of Arizona. Any time a person wants that information he can get it, it is open.

Q. Did you tell him the depth of the well?

A. I believe it was mentioned, yes.

Q. And what depth did you tell him?

A. You are going back to things like that——

Q. If you don't remember, just say so.

A. Well, I don't remember. I would have told him the correct depth if I told him. But whether he asked and whether I told him, I don't know.

Q. Did you tell him there was a flange in the spout? A. No.

Q. And you didn't feel it was necessary to tell him then?

A. No more than I felt it necessary to tell him the breakdown was caused by decreased gas pressure. That was all history. That was part of the operation. [37]

Mr. Rehnquist: No more questions.

Mr. Burch: That will do here.

/s/ ELMER F. SHEPARD,
(Signature of Witness.)

[Endorsed]: Filed May 21, 1956. [38]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Report of Proceedings had and evidence taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, commencing on the 17th day of May, A.D. 1956, at the hour of ten o'clock a.m.

Present:

RAGAN & REHNQUIST, by
WILLIAM H. REHNQUIST and
KEITH W. RAGAN,
Appeared for Plaintiff.

KRAMER, ROCHE & PERRY,
F. HAZE BURCH,
Appeared for Defendants.

The Clerk: Civil No. 2343, Cal-Nine Farms, Plaintiff, versus Elmer F. Shepard and Kathryn M. Shepard, his wife, Defendants, for trial.

Mr. Rehnquist: Plaintiff is ready.

Mr. Burch: Defendants are ready.

The Court: All right.

Mr. Rehnquist: Your Honor, at this time we submit a written motion for leave to file an Amended Complaint.

The Court: All right. Do you have any objections?

Mr. Burch: No, your Honor, if we are allowed to amend our answer. That will be the necessary thing. I may be able to dictate an amended answer into the record, with the Court's leave, and if the Court wishes, to file at a later date a written answer.

The Court: All right.

Mr. Burch: With the Court's permission, for the purpose of the record, in answer to the Amended Complaint of the plaintiff—and with the stipulation, if that is correct, counsel, that we may file a written answer, if necessary, at a later time?

Mr. Rehnquist: That is correct.

The Court: You may.

AMENDED ANSWER

Mr. Burch: In answer to the Amended Complaint, defendants, and each of them, admit the allegation in the first [2*] count of Paragraph I, deny the allegations contained in Paragraphs II, III, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of said amended complaint, and defendants, in regard to Paragraph IV of said Amended Complaint, admit that Cal-Nine Farms

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

entered into an agreement to purchase the land described in said Amended Complaint, deny that Cal-Nine Farms exercised any option right.

Defendants deny each and every, all and singular, remaining allegations in the complaint not specifically admitted heretofore; wherefore, the defendants pray that the plaintiff take nothing by its complaint, and that defendants have judgment against plaintiff for their costs necessarily incurred herein, or such further relief as the Court deems proper.

Mr. Rehnquist: Your Honor, we would also like to submit to the Court at this time a written Memorandum of Authorities.

The Court: Trial Memorandum?

Mr. Rehnquist: Trial Memorandum.

The Court: All right.

Mr. Rehnquist: And may the record show that counsel for the defendant has been given a copy of that.

Mr. Burch: It may so show.

The Court: Does that dispose of the preliminaries?

Mr. Rehnquist: Yes, your Honor. [3]

The Court: All right, call your first witness.

Mr. Rehnquist: At this time we would like to invoke the rule and exclude non-party witnesses.

The Court: All right. Call your witnesses up on both sides.

(Witnesses present were duly sworn.)

The Court: Witnesses will be required to re-

main out of the Courtroom during the course of the trial. That doesn't apply to the parties, however.

(Witnesses other than parties were excluded from the courtroom.)

Mr. Rehnquist: I will call Mr. Otto.

ERNEST H. OTTO

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Ernest H. Otto.

Q. Where do you reside? A. In Buckeye.

Q. How long have you lived there?

A. Since March of 1955.

Mr. Burch: Mr. Otto, I can't hear you. [4]

The Witness: Since March of 1955.

Q. (By Mr. Rehnquist): Where did you live before that? A. Fresno, California.

Q. How long did you live over there?

A. I was born and raised there.

Q. In Fresno? A. Yes.

Q. What is your present occupation?

A. Farming.

Q. Are you a shareholder of Can-Nine Farms, Incorporated? A. Yes.

Q. Do you occupy an office in that corporation?

A. Yes.

Mr. Burch: If the Court please, we will object.

(Testimony of Ernest H. Otto.)

I think the best evidence of that is the corporate records.

The Court: That is probably true. Go ahead and answer.

Mr. Burch: It may become important as a law point.

The Court: All right, if it does I will insist on having the record.

Mr. Rehnquist: Go ahead and answer.

The Witness: Yes.

Q. (By Mr. Rehnquist): What is that office?

A. President. [5]

Q. What was your occupation in California?

A. Farming.

Q. How long have you been in farming, both in California and in Arizona? A. About 20 years.

Q. Did you farm cotton? A. Yes.

Q. How much of that time?

A. About 5 years.

Q. How far did you get in school, Mr. Otto?

A. I went to the 10th grade.

Q. Then you went to work?

A. That is right.

Q. Are you acquainted with farm land in the Fresno area? A. Yes.

Q. Are you acquainted with the water table there? A. Yes.

Q. What in your experience is the depth of a relatively deep well by the standards of the Fresno area?

(Testimony of Ernest H. Otto.)

Mr. Burch: I object to the question as having no probative value in regard to this particular area.

The Court: It may be. I don't know. Go ahead. Can you answer the question?

Mr. Burch: We make further objection that there has been no foundation laid. [6]

The Witness: In the area I was from, it was from 100 to 150 feet.

Q. (By Mr. Rehnquist): Are you familiar with pumps on wells in the Fresno area?

A. Yes, where I farm.

Q. And what would you say was the average life of a set of bowls on the pumps over there?

Mr. Burch: Same objection, no foundation laid.

The Court: Same ruling. Go ahead.

The Witness: I would say 10 to 15 years.

Q. (By Mr. Rehnquist): When did you first visit Arizona?

The Court: What part of a pump is that?

The Witness: That is the bowls.

The Court: What are the bowls of the pump?

The Witness: The bowls is the part that pumps up water from the bottom, brings up your water.

The Court: Down in the well?

The Witness: Yes.

The Court: What would wear them out, sand?

The Witness: What was that?

The Court: What would wear them out, sand?

The Witness: Well, sand, I imagine. [7]

The Court: Sand?

The Witness: I imagine.

(Testimony of Ernest H. Otto.)

The Court: All right.

Q. (By Mr. Rehnquist): When did you first visit Arizona? A. In 1953.

Q. And what was the purpose of that visit?

A. To pick cotton.

Q. How long did you stay here?

A. Well, I was just here off and on. I had the men operating cotton pickers for me, and I would just go over and look after them, and go back to Fresno again.

Q. Was that just during the cotton picking season? A. Yes.

Q. When did you visit Arizona again?

A. In 1954.

Q. What was the purpose of that visit?

A. To pick cotton with machines again.

Q. In what areas did you pick cotton in 1954?

A. In the Harqua Hala Valley.

Q. Where is that, the Harqua Hala Valley?

A. About 40 miles west of Buckeye.

Q. For whom did you pick cotton?

A. I picked for Mr. Gordon Cameron, and the Centennial Farms. [8]

Q. Those are both in the Harqua Hala Valley?

A. That is right.

Q. Are you acquainted with the defendant in this action, Elmer Shepard? A. Yes.

Q. Do you see him in the courtroom now?

A. Yes.

Q. Would you point him out?

(Testimony of Ernest H. Otto.)

A. He is sitting right next to the other lawyer there.

Q. When did you first meet Mr. Shepard?

A. It was in 1954.

Q. While you were picking cotton?

A. That is right.

Q. Did you ever have occasion to talk to him about buying some property he owned in the Harqua Hala Valley? A. Yes.

Q. When was that?

A. I would say it was about October, 1954.

Q. And what were the circumstances of that conversation? Was anybody else present?

A. No, just Elmer and I.

Q. And will you state that conversation?

Mr. Burch: If the Court please, could we find out where this conversation took place? [9]

Q. (By Mr. Rehnquist): Where did the conversation take place?

A. It took place on a ranch that Gordon Cameron was renting. I believe they call it the Stall place.

Q. Would you state the conversation?

A. Well, I was on the end of the rows there just waiting for the pickers to come up, and Elmer, he rode up on horseback that day, and we just had a general conversation, and I asked him if their ranch was for sale, that is, Gordon Cameron and Ed Swindle told me it was for sale, and I just wanted to find out if it was.

Q. And what did Mr. Shepard answer?

A. He said, yes, he was trying to sell it.

(Testimony of Ernest H. Otto.)

Q. Was there any discussion of price?

A. Yes.

Q. Did Mr. Shepard quote a price at that time?

A. Yes.

Q. What price did he quote? A. \$80,000.

Q. Had you ever seen the Shepard land during the cotton growing season prior to this time?

A. No.

Q. Had you ever seen the well running on the land before this time? A. No.

Q. Did you have any discussion as to the well on the [10] land at this time, at that time you first talked to Mr. Shepard about the property?

A. I think we did.

Q. Will you state that discussion?

A. Well, I asked him several questions about it, and I asked him about the land and the condition of the place.

Q. And what were his responses?

A. Well, he said it was a good ranch.

And I asked him why he wanted to sell it, and he said he had trouble with his eyes. He said the dust out there bothered his eyes, and he wanted to sell it so he didn't have to go out there any more.

Q. Did you later that same year have a conversation with Mr. Shepard about his ranch, on the premises of the ranch itself? A. Yes.

Q. When would that be, to the best of your recollection? A. That was in November.

Q. And who else was present?

A. Henry Haas.

Q. And Mr. Shepard was present?

(Testimony of Ernest H. Otto.)

A. And Mr. Shepard, yes.

Q. Was anyone else present?

A. There was someone else on the ranch operating a cotton picker, but he was not talking [11] with us.

Q. He was not actually participating in the conversation? A. No.

Q. Did you at that time talk about the well on the land? A. Yes.

Q. Did Mr. Shepard make any statement as to the output or capacity of the well? A. Yes.

Mr. Burch: I will object to counsel leading the witness. He has done that two or three times in a row.

The Court: Go ahead.

The Witness: Yes.

Q. (By Mr. Rehnquist): What was that statement?

A. I asked him what the output of the well was, and he told me it was 2,200 gallons per minute.

Q. Were those the words he used?

A. Yes. He said Jules Turner estimated the pump as throwing 2,400 gallons per minute, but he said he didn't think it was quite doing that. He said, "I think it is throwing 2,200 gallons."

Q. Did he run the well on the land at that time?

A. Yes.

Q. He turned on the pump? A. Yes.

Q. How long did it run? [12]

(Testimony of Ernest H. Otto.)

A. I would say 10 or 15 minutes, just a short while.

Q. Did you make any observation as to the character of the water coming out of the pump?

A. Yes.

Q. What observation was that?

A. Well, we seen the water coming out. Is that what you mean?

Q. Well, did you notice anything about the water coming out of the pump?

A. Yes, I noticed it was unusually dirty looking water.

Q. Did you say anything to Mr. Shepard about that? A. Yes.

Q. What did you say?

A. I told him, I said, "Boy, that is sure dirty looking water coming out of there."

Q. What did he say?

A. He said, "Yes, they all do that when you first start them up."

Q. Did Mr. Shepard make any other statements to you at this time about the capacity of the well, or its condition? A. Yes.

Q. What were those statements?

A. He told us the well and the pump, and everything, was in good condition, that it was a gravel packed well, and it was in good condition. [13]

Q. Did you make any inquiry as to whether he had ever had any trouble with the well?

A. Yes.

Q. What did you ask him?

(Testimony of Ernest H. Otto.)

A. I asked him if he ever had any trouble with his well.

Q. And what did he say?

A. He said, "Well, we had a little trouble here. But," he said, "you really couldn't class it as trouble." He said that the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he said they ended up pulling the pump out of the hole, and found out everthing was in good condition, and there was something wrong with the engine, and he had that taken care of.

Q. Did he make any further statement to you about the previous history of the well?

A. I don't believe he did.

Q. Did he ever say anything about Mr. Cameron having gone back in the well? A. Yes.

Mr. Burch: We object to his leading again. If Mr. Rehnquist wants to testify, we suggest he take the stand. That is not proper examination.

The Court: That last was leading.

Mr. Rehnquist: I beg your pardon. [14]

The Court: That last was leading. Ordinarily it doesn't make too much difference about a leading question, unless it was suggesting the answer. What difference does it make? It saves time.

Mr. Burch: It does suggest answers, if the Court please.

The Court: He didn't suggest any answers. Go ahead.

The Witness: What was the question?

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Read the question, please.

(The question and answer were read.)

Q. (By Mr. Rehnquist): And what was that statement?

A. He told me that Mr. Cameron went back into the well, and they deepened that hole. I forget exactly how many feet, but he said from what depth to what depth that he went.

Q. Did Mr. Shepard make any statement to you at this time about the tube capacity of the well?

A. Yes.

Q. What was that statement?

A. He said it would handle 70 to 75 siphon tubes.

Mr. Burch: Is the Court aware of what he is speaking of, in tubes?

The Court: What was that?

Mr. Burch: When the witness talks about tube capacity, is the court aware of what he is talking about?

The Court: No. [15]

Q. (By Mr. Rehnquist): What are these tubes you just referred to?

A. The siphon tubes are pipes that you lay over your ditch bank that take the water out of there into the furrows onto your cotton.

The Court: What size pipes were those?

The Witness: They were two-inch pipes, these particular pipes were two-inch.

Q. (By Mr. Rehnquist): Were there some pipes

(Testimony of Ernest H. Otto.)

visible at the time Mr. Shepard made this statement to you? A. Oh, yes.

Q. What diameter were those pipes?

A. Two-inch pipes.

Q. Did you make any inquiries of anyone else regarding the well on this property? A. Yes.

Q. Was this before the time you talked to Mr. Shepard in the conversation you just related, or after? A. Before.

Q. Who else did you make inquiries of?

A. I spoke to Gordon Cameron about it.

Q. Does Mr. Cameron operate a ranch in that area?

A. Yes, he is a neighbor, he adjoins me on the west, and he is also a well driller. And he deepened this well. That [16] is the reason I questioned him, because I thought he knew about it.

Q. When you say he adjoins you on the west, I take it before you bought the property he would have adjoined Elmer Shepard on the west?

A. Yes.

Q. What inquiry did you make of Mr. Cameron?

A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

Q. And what did Mr. Cameron state to you?

A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good.

Q. Who else did you make inquiry of?

(Testimony of Ernest H. Otto.)

A. Ed Swindle.

Q. And who is Mr. Swindle?

A. He is the manager of the Centennial Farms.

Q. And does he operate a ranch for Centennial Farms in that area? A. Yes.

Q. What inquiry did you make of Mr. Swindle?

A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything, [17] was.

Q. And what did Mr. Swindle tell you in response to your inquiries?

A. He told me about the same thing, that it was an awful good piece of land.

Q. Did he say anything more than that?

A. Well, we talked a lot. I can't remember the exact words we talked about. He just referred to it as a good place.

Q. Did you shortly after the conversation you have described with Mr. Shepard in the middle of November enter into a written agreement with him?

A. Yes.

Mr. Rehnquist: May this be marker for identification?

The Clerk: Plaintiff's Exhibit 1 for identification.

(Said Option to Purchase was marked as Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 1 for identification, is this that Agreement? A. Yes.

(Testimony of Ernest H. Otto.)

Q. Does it bear your signature? A. Yes.

Q. Was it signed by Mr. Shepard in your presence? A. Yes.

Mr. Rehnquist: We will offer this in evidence, if the [18] Court please, as Plaintiff's Exhibit Number 1.

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit Number 1 in evidence.

(Said Option to Purchase was received in evidence and marked as Plaintiff's Exhibit 1.)

Q. (By Mr. Rehnquist): Would you read the title of that Agreement, Mr. Otto, the underscored part? A. Option to Purchase.

Q. At the time of the execution of this Option Agreement, did Mr. Haas also sign the agreement?

A. Yes.

Q. And is Mr. Haas here in the courtroom today? A. Yes.

Q. Would you point him out to the Court?

A. Sitting on the end of the table.

Q. And is Mr. Haas a shareholder in Cal-Nine Farms now? A. Yes.

Q. Does he occupy an office in that corporation?

A. Yes.

Q. What office is it?

A. Vice president.

Q. At the time of the execution of this Option Agreement, was Cal-Nine Farms incorporated? [19]

(Testimony of Ernest H. Otto.)

A. We were in the process of being incorporated.

Q. Was it incorporated? Had it been officially made a corporation?

A. Not when we took this option, no.

Q. Did you contemplate incorporating? Would you have if you exercised the Option? A. Yes.

Q. Did you pay Mr. Shepard the \$2,000 required by the Option Agreement?

A. Mr. Haas did, yes.

Q. And who had put up this money?

A. Well, it was a group of fellows from California.

Q. And did Mr. Shepard know at that time that there were more people than just you and Mr. Haas interested in the property?

A. Yes, we told them.

Q. Did you have any further discussion regarding the property with Mr. Shepard at any later time? A. Yes.

Q. Where was that?

A. It was in a drugstore in Buckeye.

Q. Was this before the Escrow instructions were executed? A. No, this was after.

Q. Did you have any further discussion before the Escrow instructions were executed? [20]

A. How was that again?

Q. Did you have any other conversation with Mr. Shepard about this ranch when you and Mr. Haas were over here in November?

A. Yes.

Q. Where was that?

(Testimony of Ernest H. Otto.)

A. Well, one time was in the Buckeye Motel, I remember.

Q. Who was present there?

A. There was Henry Haas, and Elmer Shepard, myself, and a fellow by the name of Woody.

Q. Do you know Woody's full name?

A. No, I don't.

Q. And what was the conversation that took place there with regard to the ranch?

A. Oh, we just had a general conversation, and I do remember we tried to buy the ranch for a little less money from Elmer that night, and also we were getting, we were trying to get him to give us a few more acres of cotton allotment that went with the ranch, and just talking general.

Q. You did have a discussion pertaining to the cotton allotment of the ranch, though?

A. Oh, yes.

Q. Did Cal-Nine Farms ever exercise the option given by the option agreement?

A. Yes. [21]

Mr. Burch: If the Court please, we are going to object to the witness answering that question again, that it is a matter of corporate records as to whether they exercised an option, or not, and this man's conclusion to that effect is a matter of proof.

Mr. Rehnquist: Your Honor, we are going to offer in evidence the Escrow Instructions pursuant to an Agreement of Sale executed by Cal-Nine Farms and defendant Elmer Shepard, and reciting that the \$22,000 had been paid under the Option.

Mr. Burch: Let us get it in.

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Okay. May that be marked for identification?

The Clerk: Plaintiff's Exhibit 2 for identification.

(Said Escrow Instructions were marked as Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 2 for identification, does this instrument bear your signature? A. Yes.

Q. And is that the signature of Henry Haas?

A. I believe it is.

Q. And did Mr. Shepard sign that in your presence? A. Yes.

Mr. Rehnquist: We will offer number 2 in evidence.

Mr. Burch: No objection, your Honor. [22]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Said Escrow Instructions were received in evidence and marked as Plaintiff's Exhibit 2.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 2 in evidence, will you read the caption on that.

A. "Escrow Instructions to—Phoenix Title & Trust Co."

Q. And will you read this part at the bottom right above the signatures?

A. "Cal-Nine Farms."

Q. By—

(Testimony of Ernest H. Otto.)

A. "By Ernest H. Otto. By Henry Haas."

Q. Did you on behalf of Cal-Nine pay the additional sum of \$18,000 to Mr. Shepard?

A. Yes.

Q. When was that done?

A. I believe it was January the 11th of 1955.

Q. That sum was paid at the same time you signed the Escrow Instructions?

A. That is right.

Q. What was the total purchase price called for by this Agreement? A. \$80,000.

Q. And what was the total acreage of land involved? [23] A. 320 acres.

Q. Where is this property you bought with relation to Buckeye?

A. It is about 40 miles west of Buckeye.

Q. Is it desert land?

A. Well, I guess you would class it as desert land.

Q. And the well to which your discussions have related is the only water supply on that land?

A. That is right.

Q. Is there a house on the property?

A. No.

Q. Do you live on the property since you bought it? A. No.

Q. You still live in Buckeye?

A. That is right.

Q. When did you first have occasion to turn on the well after you had bought the property ?

A. I believe it was April of 1955.

(Testimony of Ernest H. Otto.)

Q. Going back for a minute to the conversation with Mr. Shepard in November, did you observe the output of the well at that time? A. Yes.

Q. What did the well appear to you to be putting out? A. About 2,000 gallons a minute.

Q. Did you notice anything about the output of the well [24] when you turned it on in April after you had bought the property? A. Yes.

Q. What did you notice?

A. Well, I found out it was not throwing as much water as we were led to believe it was throwing.

Q. How did you find that out?

A. Well, when we began to start our siphon pipes to irrigate, it wouldn't run near as many pipes as it was supposed to run.

Q. And what size pipe were you using at this time? A. Two-inch.

Q. How many pipes would it run?

A. We started 55 pipes.

Q. Did the well still appear to be putting out as much water as it had when you looked at it in November? A. Yes.

Q. Did you make a further investigation of the spout at this time? A. Yes.

Q. What did you discover, if anything?

A. We discovered that someone had welded a piece of iron, a flange, or whatever you want to call it, on the inside of the discharge pipe, and the water would come out and hit this and give it an appear-

(Testimony of Ernest H. Otto.)

ance that it was throwing more water [25] than was coming out of it.

Q. Mr. Otto, will you draw on the blackboard what you mean by that?

A. (Witness makes diagram.) It had the appearance like this. It was a 12-inch pipe, and then they had welded an elbow or down-turn, or whatever you want to call it, on there. Then where this straight pipe ended, the 12-inch pipe ended, before this was welded on, there was a piece of iron welded on the inside of the pipe. (Indicating.)

Q. What effect, if any, did that have on the appearance of the output of the well?

A. It made it look like there was more water coming out than actually was coming out, because it kind of put a pressure on the water behind.

Q. Were you familiar with a device such as this inserted in spouts? A. No.

Q. Had you ever seen one before? A. No.

Q. What did you have to do in order to see that little device that was welded in there?

A. Well, there was a box, cement box, a weir box, they call it, that was built kind of like this, where the water poured into, and this was laying flat on the ground, so when you were on the ground you couldn't very well look in there, [26] so if you put your head way down, or got on the box and looked up around the elbow, then you could see it.

Q. It was not visible to the naked eye, then?

A. No.

Q. What would be your estimate of the output of

(Testimony of Ernest H. Otto.)

the well on the day you turned on the irrigation, in the spring?

Mr. Burch: If the Court please, I think we ought to have some foundation laid that he is capable of making that estimate.

The Court: All right.

Q. (By Mr. Rehnquist): You have been farming for how long, Mr. Otto?

A. About 20 years.

Q. During that time you have used wells?

A. Yes.

Q. And you have irrigated? A. Yes.

Q. And you have used siphon tubes?

A. Yes.

Q. And is it possible to reach some general conclusion as to the output of a well from a combination of observation of the water coming out the spout, and the number of tubes that it will run?

Mr. Burch: He is now qualifying him by doing the very thing we object to, without foundation.

The Court: Go ahead. [27]

Mr. Rehnquist: Answer the question.

The Witness: Yes.

Q. (By Mr. Rehnquist): What would you estimate the output of this well at the day you turned it on, in the spring of 1955?

Mr. Burch: Same objection.

The Witness: I would estimate it at 1,300 to 1,400 gallons of water.

Q. (By Mr. Rehnquist): If this output at that time had remained constant throughout the summer,

(Testimony of Ernest H. Otto.)

would it have been sufficient to irrigate the amount of cotton which you were allowed to plant, and did plant that year? A. Yes.

Q. How many acres was that?

A. We finally wound up with 105 acres.

Q. Is there any rule of thumb that you know of, through your experience as a cotton farmer, as to the number of gallons per minute required to irrigate cotton acreage?

A. The general saying among everybody is 1,000 gallons per minute will handle 100 acres of cotton.

Q. What happened to the output of the well in the succeeding months of the growing season?

A. Well, it just kept decreasing, steadily decreasing. [28]

Q. And what finally happened to the well?

Mr. Burch: We make the same objection, unless he can show he knows, if the Court please, without giving a mere opinion without foundation.

Mr. Rehnquist: Your Honor, he was farming out there all summer.

The Court: Ask him what happened to the well. Maybe it dried up. I don't know. Go ahead.

The Witness: It kept decreasing so much that in September, the early part of September, I shut it down. It was just running a very small stream of water.

Q. (By Mr. Rehnquist): What did you estimate the gallons per minutes at that time?

A. At that time, I would say 250, 300 gallons.

(Testimony of Ernest H. Otto.)

Q. Did you ever consult anyone about this well?

A. Yes.

Q. Who?

A. Gordon Cameron, the well man.

Q. When was the first time you talked to him about it?

A. Well, just shortly after we started it. We started our conversations about this well.

Q. Did you have a conversation with him about it in June or early July of 1955? [29]

A. Yes, I asked him if he wouldn't come out the first part of July.

Q. Why did you ask him at that time?

A. Well, the well was decreasing to a point that I was getting alarmed, and also the pump was sinking into the ground.

Q. Did you ask his advice at that time?

A. Yes.

Q. And what advice did he give you?

A. He told me, he said, "Well," he said, "don't ever shut this thing off."

He said, "If you do, you're going to be completely without water, without a well, without anything," and he said, "You've got too good a crop here started to take any chances on it." He said, "Don't shut it off."

Q. Did you leave the pump running?

A. Yes.

Q. Was that in reliance on Mr. Cameron's advice?

A. Yes.

(Testimony of Ernest H. Otto.)

Q. Did you have any other conversations with Mr. Cameron about the well?

A. Yes, I had quite a few with Mr. Cameron.

Q. Did you have a conversation with him in October of 1955? A. Yes.

Mr. Burch: If the Court please, this is all hearsay. [30] I haven't wanted to object, because maybe the Court wants to hurry it along, but I certainly do object now.

Mr. Rehnquist: Your Honor, in a misrepresentation case, the reasonableness of the Plaintiff's actions in attempting to mitigate damages is relevant, and it is not hearsay for that purpose, if he followed the advice of a man he believed to be a well expert. The mere fact that it was stated to him is relevant for that purpose. It is just the same thing when you are trying to prove notice.

The Court: It might be.

Q. (By Mr. Rehnquist): Where did this conversation take place?

A. It took place in my home in Buckeye.

Q. Who was present?

A. Gordon Cameron, and his wife, and my wife, and myself.

Q. This was after you had turned the well off?

A. That is right.

Q. Had you spoken to Mr. Cameron before this conversation about the possibility of repairing the well? A. Yes.

Q. What did Mr. Cameron tell you at this time?

(Testimony of Ernest H. Otto.)

Mr. Burch: We make the same objections. Hear-say.

The Court: All right, go ahead.

The Witness: Well, he come to the house that morning, and he said [31] that he just decided he might as well lay the cards on the table and make it plain to me that I shouldn't try to repair that well.

He says, "I don't care if I get the job, or someone else gets it, but," he says, "I don't want you to spend five, six, seven thousand dollars working on that well, because," he says, "It is impossible to repair."

And I asked him what made him think so, and he kind of laughed, and he said, "Well, I'm not thinking," he said, "I know."

I said, "How do you know?"

He said, "I was in that hole last year," and he said, "That casing was broke or collapsed at that time when we went into that hole." And he said, "We put our drill into it, and at 477 feet it stopped. So they pulled that bit out and put on smaller sizes." And he said they finally got, I believe it was, an 11 or 12-inch bit. He said they stayed there a couple of hours and drilled through the bad place. Then they went on down and deepened the well for Elmer. "But," he said, "It was impossible to repair the well."

Q. (By Mr. Rehnquist): Did you, after the cotton season, replace the well? A. Yes.

Q. Who drilled the new one for you?

(Testimony of Ernest H. Otto.)

A. Gordon Cameron. [32]

Q. When was this done?

A. The end of December of 1955.

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 3 for identification.

(Said Statement was marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 3 for identification, is that the bill you received from Gordon Cameron for his services?

A. That is right.

Q. In drilling you this new well? A. Yes.

Mr. Rehnquist: We will offer No. 3 in evidence.

Mr. Burch: If the Court please, we will object to this being admitted in evidence. Certainly no measure of damages would allow this to be admitted without first showing it is of the same kind of well, same materials, same depth, same thing he bargained for. There hasn't been this showing yet. Therefore, this bill for costs, labor, and repair has no probative value. You must first establish it has some relationship in the measure of damages to the original well. It may have been a bigger well, a smaller well. There is no showing yet.

The Court: All right. What kind of a well was it? [33]

Mr. Rehnquist: Your Honor, we plan to call Mr. Cameron in this matter.

(Testimony of Ernest H. Otto.)

The Court: You will have him testify?

Mr. Rehnquist: Yes.

The Court: All right. That may be received. I thought he might have been unavailable.

Mr. Burch: If the Court please, I suggest before they testify from this that we find out from Mr. Cameron what the facts are.

The Court: There is no jury here.

Mr. Rehnquist: We can't prove our whole case at the same minute. That was received, your Honor?

The Court: Yes, it may be received.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(Said Statement from Gordon Cameron was received in evidence and marked as Plaintiff's Exhibit 3.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 3 in evidence, what is the total amount of that bill? Will you read from the bill?

A. \$17,541.73.

Q. Did you incur any other expenses in connection with the drilling of this new well?

A. Well, yes, we had to put up a new pump base.

Q. And who did that work for you?

A. A cement contractor by the name of Dan Fuller. [34] And we also had to put new bowls in this pump.

Q. Who did that work for you?

A. Arizona Engine and Pump Company.

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 4 for identification.

(Said documents were marked as Plaintiff's Exhibit 4, for identification.)

Q. (By Mr. Rehnquist): Handing you plaintiff's Exhibit 4, for identification, is this top statement a bill you received from Arizona Engine and Pump Company in connection with the replacement of the well?

A. This was a bill just to remove the old pump out of the well, this one.

Q. And was this statement in connection with their services in taking the pump out of the old well and replacing it in the new well?

A. That is right.

Mr. Rehnquist: We offer No. 4 in evidence.

Mr. Burch: We make the same objection. No foundation laid.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(Said documents, Arizona Engine & Pump Co., were received in evidence and marked as Plaintiff's Exhibit 4.) [35]

Q. (By Mr. Rehnquist): Did you also incur an obligation in connection with the gravelling of the new well at this time? A. Yes.

Q. And to whom was that obligation?

(Testimony of Ernest H. Otto.)

A. Joe Conway Gravel Company, I believe is the name of it.

Mr. Rehnquist: May it be marked as Plaintiff's Exhibit 5 for identification.

The Clerk: Plaintiff's Exhibit 5 for identification.

(Said Statement, Joe Conway, was marked as Plaintiff's Exhibit 5 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 5 for identification, is that the statement of charges you received from Joe Conway?

A. That is right.

Mr. Rehnquist: We will offer No. 5 in evidence.

Mr. Burch: We make the same objections. No foundation laid.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(Said Statement, Joe Conway, was received in evidence and marked as Plaintiff's Exhibit 5.)

Q. (By Mr. Rehnquist): What did you do with the pump that was in the old [36] well, Mr. Otto?

A. Well, we couldn't use the bowls off of the pump, so we replaced them with new bowls.

Q. But you moved the gearhead and the remaining part of the pump over to the new well?

A. Oh, yes.

Q. What did you do with the engine on the old pump?

(Testimony of Ernest H. Otto.)

A. We moved it over, and we are using the engine.

Q. What did you do with the casing of the old well?

A. We tried to salvage as much casing as we could out of the old well, so they set the derrick over the well, and they recovered 361 feet of old casing.

Q. Were you present during most of the operations to remove the pump? A. Yes.

Q. Did you see the pump when it was pulled?

A. Yes.

Q. What was the appearance of the pump when it was pulled?

A. Well, the bowls were worn, and as I remember, they had an awful time getting it out of the hole. They said it was sanded up down there. The bowls were covered with sand.

Mr. Burch: If the Court please, that is hearsay again. We are going to object to it.

The Court: All right. What do you know of your own knowledge? [37]

The Witness: Of my own knowledge, I knew they had an awful time. They wouldn't pull this pump up. They radioed to Phoenix to try to get me, to find out where I was at before they would pull on it any more. They said they wouldn't any more on their own, because they were afraid they were going to pull this shafting in two. It was stuck in the bottom.

Q. (By Mr. Rehnquist): Was there any at-

(Testimony of Ernest H. Otto.)

tempt made in your presence to put a plumb down in the well after the pump was pulled?

A. Yes.

Q. Will you describe that attempt and its result?

Mr. Burch: I will object to that. That has nothing to do with this matter, what they did after they got in there and pulled the bowls.

The Court: The casing was in there, was it not?

The Witness: Yes.

Mr. Burch: There is no showing it was. There is no showing what damage was done when they pulled the bowls.

The Court: Find out.

The Witness: Yes, they did. The man working for Gordon Cameron, I forget what they call it, he dropped, it was a small wire on a pole, they put a heavy weight on it, and let it down into the well, and they wanted to find out the depth of the well. Then he pulled it out and he laid it out on the ground [38] and measured it with 100-foot tape, and the well was just 380 feet deep, and it was filled up with sand up to that point.

Q. (By Mr. Rehnquist): Have you tested your new well?

A. I have pumped it, but I haven't had it officially tested.

Q. The only way you would know about its output is by estimate? A. Yes.

Q. What would you estimate its output at?

(Testimony of Ernest H. Otto.)

Mr. Burch: We will object to his making an estimate. No foundation.

The Court: I don't think it makes any difference.

Mr. Burch: At least for the record, he testified in the beginning he came from California.

The Court: I don't want to hear any more argument. What difference does it make now?

Mr. Burch: Very well.

The Witness: I would estimate it between——

The Court: You don't have to answer that now. That is a new well?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Rehnquist): Where is the new well located, with respect to the [39] other well?

A. It is about 125 feet north of the old well we abandoned.

Q. Is there also a third well on the property?

A. Yes.

Q. When did you plant your cotton crop last year?

A. It was in the first part of May.

Q. State again how many acres you planted.

A. 105 acres.

Q. Did you fertilize your crop? A. Yes.

Mr. Rehnquist: May this be marked as number 6 for identification?

The Clerk: Plaintiff's Exhibit 6 for identification.

(Testimony of Ernest H. Otto.)

(Said Statements, Fannin's, were marked as Plaintiff's Exhibit 6 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 6 for identification, are these bills you received for fertilizer that you purchased?

A. Yes.

Q. And did you use that fertilizer on the property in question here? A. Yes.

Mr. Rehnquist: We will offer No. 6 in evidence.

The Court: You object to it? [40]

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Said Statements, Fannin's, were received in evidence and marked as Plaintiff's Exhibit 6.)

The Court: We will have our morning recess.

(The morning recess was had.)

The Court: You may continue.

Q. (By Mr. Rehnquist): Mr. Otto, just before recess, you testified that there was a third well on the property? A. That is right.

Q. Was that well ever in operation while you owned the property? A. No.

Q. It is just a hole? A. That is right.

Q. Is it covered? A. Yes.

Q. In what manner is it covered?

A. Well, it has a piece of steel welded over the pipe, and then there is another cover laying over the top of the steel.

(Testimony of Ernest H. Otto.)

Q. During the growing season of last year, did you dust [41] your cotton crop for insects?

A. Yes.

Q. How do you determine when to dust?

A. Well, by watching the cotton plants myself, and also Fannin's fertilizer company at Buckeye, they have a man that comes around once a week and checks the bugs for you, and they take the count of the bugs, and if there are so many, they recommend that you dust.

Q. How many times did you dust last year?

A. Four times.

Mr. Rehnquist: Will you mark this for identification?

The Clerk: Plaintiff's Exhibit 7 for identification.

(Said Statements, Fannin's, were marked as Plaintiff's Exhibit 7 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 7 for identification, are these statements you received from Fannin's for dust you purchased from them last year? A. Yes.

Q. And was that dust all applied to the property here in question, to your cotton crop?

A. That is right.

Mr. Rehnquist: I offer No. 7 in evidence.

Q. (By Mr. Rehnquist): Is this top bill a total of these invoices that are [42] attached?

A. Yes.

Mr. Burch: No objection. That figure is \$2,478.64, is that correct?

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Yes.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 7 in evidence.

(Said Statements, Fannin's, were received in evidence and marked as Plaintiff's Exhibit 7.)

Q. (By Mr. Rehnquist): When did you pre-irrigate last year? A. It was in April.

Q. And how many tubes were running at first, when you first started to pre-irrigate? A. 55.

Q. And those were 2-inch tubes? A. Yes.

Q. What drop or head were you running these tubes at? A. Between four and five inches.

Q. Would you explain to the Court what you mean by drop or head? A. Well, that is—

Q. Use the blackboard, if you want to.

A. I'm not too good of an artist. It is how high the water is in the ditch. Maybe I better. [43]

(Witness makes diagram.)

This will be your ditch bank here, and your water in here. Then the water will be at this level. Then you put this siphon tube in and lay it over the ditch, and where this water runs out of the siphon it would be from four to five inches lower than the water level in your ditch.

Q. That is what you mean by a four to five inch head? A. That is right.

Q. And 55 2-inch tubes was the maximum you could run at this time? A. Yes.

(Testimony of Ernest H. Otto.)

Q. And were all the tubes discharging all of their water into the furrows?

A. All of the water that was coming out of them, yes.

Q. At the end of your pre-irrigation, how many tubes were you able to run? A. 43 to 45.

Q. Would the decline from 55 tubes to 43 or 45 be a decline in the output of the well?

A. No, not all of it, because the further you run your pump from the well, the ditch will absorb a certain amount of water.

Q. How much of this decline was attributable to a decline in the output of the well, would you say?

A. I would say 5, 6, 7 pipes. [44]

Q. How long did it take you to pre-irrigate?

A. It took us about a month.

Q. When did you have your second irrigation?

A. It was in June.

Q. How long an interval was it between the end of your pre-irrigation and the beginning of your second irrigation?

A. From when we quit pre-irrigating?

Q. Yes. A. I would say about 30 days.

Q. Did you still run 2-inch tubes for your second irrigation?

A. No, I bought some plugs that they have that you can reduce the hole size in your pipe. In other words, I put in plugs and made inch-and-a-half pipe out of 2-inch pipe.

Q. Had the tubes you got from Mr. Shepard, along with the land, did they have plugs in them?

(Testimony of Ernest H. Otto.)

A. Yes.

Q. But these weren't the same plugs that you used?

A. No.

Q. So you pulled the plugs that you found in Mr. Shepard's for your pre-irrigation, is that right?

A. Yes, that is right.

Q. Did the number of tubes you could run drop down during the course of your second irrigation?

A. Yes. [45]

Q. How much?

A. Like I say, we put in inch and a half plugs in these pipes, so when we started the second irrigation, we went back to 55, 56 pipe, and then it steadily decreased again.

Q. Even with the inch and a half tube?

A. That is right.

Q. Does a one and a half inch tube put out a smaller amount of water than a two-inch tube?

A. Oh, yes.

Q. You state during your second irrigation that you had one of your conversations with Mr. Cameron which you have described?

A. I believe we did talk during the second.

Q. And was that the time he told you to leave the pump running?

A. That was either at the end of the second or the beginning of the next irrigation. I'm not sure.

Q. After Mr. Cameron had told you to leave the pump running, did you run it continuously from then on?

A. Yes, I let it on, but it stopped once or twice during that time by itself, and we restarted it.

(Testimony of Ernest H. Otto.)

Q. Was the pump, then, for all practical purposes running continuously, from the early part of July until September? A. That is right.

Q. As of June 1st, would you say you had a good crop in [46] the making? A. Yes.

Q. How can you tell that?

A. Well, it is just by looking at your plants and observing.

Q. Based on your experience as a cotton farmer, could you predicate, in terms of bales as to the acre at that time, what you would harvest in the fall?

Mr. Burch: We object to that as calling for a conclusion. A number of things enter into what his ultimate crop would be. The Arizona rule is that he find out what the productivity of the land was of prior years on land similiar to it. You don't make a guess on what his estimate of the crop will be.

Mr. Rehnquist: That can be brought out on cross-examination.

Mr. Burch: That still is not an estimate of what the crop would be.

The Court: It is speculative.

Mr. Burch: It certainly is.

The Court: How are you going to get at it?

Mr. Burch: The Arizona Courts have determined how.

The Court: They have offered that evidence in this Court a good many times in spraying cases, and gone up, and the Court of Appeals has passed on it. He may answer.

Mr. Burch: As I recall, even in those cases there

(Testimony of Ernest H. Otto.)

was [47] testimony as to what the land had yielded in prior years, not a bare guess.

The Court: Go ahead and answer.

The Witness: At that time, if it progressed favorably from then to the end of the season, I expected two and a quarter to two and a half bales.

Q. (By Mr. Rehnquist): As of July 1st, you say you had a good crop in the making?

A. Yes.

Q. As of August 1st? A. No.

Q. As of September 1st?

A. Absolutely not.

Q. What in your opinion caused the decline in the prospects of this crop? A. Lack of water.

Q. Were there rains in the Harqua Hala Valley last summer? A. Yes.

Q. Do you remember when?

A. They were sometime in July, I believe.

Q. Did these, in your opinion, affect the cotton crop? A. Yes, and no. [48]

Q. Would you tell us what you mean by that?

A. Well, we had some heavy rains there, and several times it come down and broke our ditch, and the water run down through the cotton, and at that time I continued letting my pump run, which Gordon Cameron advised, and I just run it out in the desert until we could rebuild this ditch. And, on the other hand, if we wouldn't have got the rains, I don't believe I would have got as much cotton as I got. The way it is, I feel I got some irrigation out of the rains.

(Testimony of Ernest H. Otto.)

Q. How long did these rains last?

A. It seemed like it was a period of two or three weeks. I'm not sure.

Q. Who picked your cotton for you last year?

A. I picked it myself.

Q. Would you have picked it yourself no matter how large a yield per acre it was?

A. I would.

Q. Where did you have it ginned?

A. At the Hassayampa Gin.

Q. Who is the manager of that gin?

A. Simcoe Walmsley.

Q. Is he the manager of several gins in that area? A. That is right.

Q. What is the name of the company that runs those gins? A. Western Cotton. [49]

Q. How many bales did you realize from the 105 acres you had in cotton last year? A. 116.

Q. Do you know the gross payments you received from the gin for the 116 bales you had ginned?

A. Around \$16,700.

Q. In your opinion, did the lack of water affect the staple length of the cotton you raised?

A. Yes.

Q. Did you ever make any effort to get extra water for your cotton crop when you saw that the well was not going to supply enough?

A. Yes, I talked to Gordon Cameron.

Q. And what was this conversation?

A. Gordon Cameron told me if my well ever quit on me that I should see his foreman he had on

(Testimony of Ernest H. Otto.)

his ranch, and if there was any extra water that they had, I could lead it around to my place. But he said, "The one point I will make clear," he said, "do not lead it through my ranch." He said, "Elmer Shepard done that the year before, and he washed a big canal through his property."

He said, "Take it out into the desert and lead it around to your place."

Q. Who else was present at this conversation?

A. Ed Swindle. [50]

Q. Did you ever take advantage of this offer of water?

A. No.

Q. Why not?

A. Well, my pump continued running, and another thing, the desert that Gordon was referring to was about 3 feet higher than the end of his ditch where I would have had to take the water out of, so I would have had to have done considerable scraping on this property before I could have brought the water down to my place.

Q. Did you know who owned the property, over whose land that ditch would have to go?

A. No.

Q. When you discussed the purchase of this property with Mr. Shepard, was the amount of water put out by the well of important consideration to you?

A. That is right.

Q. And the condition of the well, and the equipment?

A. That is right.

Q. Did you believe Mr. Shepard was telling the

(Testimony of Ernest H. Otto.)

truth when he said the well put out 2,200 gallons a minute? A. Yes.

Q. And did you believe he was telling the truth when he said the well was in good condition?

A. Yes.

Q. When was the first time you suspected the well was [51] not as good as he said?

A. The first time I started it up and irrigated with it.

Q. And when was that?

A. That was in April.

Q. And when had the purchase been completed?

A. In January, January the 11th, I believe it was.

Q. If you had known that the well had a substantially smaller output than Shepard had represented, and was not in good condition, would you have bought the land at that price?

A. Definitely not.

Q. Did you assume from Mr. Shepard's answers to your questions about the well and equipment that he had told you completely and truthfully about all the trouble he had had with the well and equipment? A. Yes.

Mr. Burch: We will object. Certainly his assumptions are of no probative value.

The Court: Did you believe what he told you?

The Witness: Yes.

Q. (By Mr. Rehnquist): If you had known there had actually been considerably more trouble, would you have bought the land at that price?

(Testimony of Ernest H. Otto.)

A. No.

Q. Going back to the tubes for a minute, Mr. Otto, of what material were these tubes made? [52]

A. Aluminum.

Q. How long were the siphon tubes?

A. $7\frac{1}{2}$ feet.

Q. How many bends did they have in them?

A. Three.

Q. And when you were running 55 tubes at a 4 inch head, all of the tubes were running at that head?

A. Yes.

Q. And when you were running—First, how many tubes were you able to run just before you shut the well off in September?

A. 18.

Q. And what was the head of those tubes?

A. About the same thing.

Q. They were all at that head?

A. Yes.

Q. And what was the diameter of the tubes you were running then?

A. An inch and a half at that time.

Q. Those were 2-inch tubes with a plug in them?

A. That is right.

Q. When you speak of a 4-inch head, Mr. Otto, where did you measure that head from, with relation to the diameter of the tube?

A. About the center of the tube. [53]

Mr. Rehnquist: We have no further questions.

(Testimony of Ernest H. Otto.)

Cross-Examination

By Mr. Burch:

Q. Mr. Otto, you stated, I think, you first came to Arizona on cotton picking business, is that correct? A. That is right.

Q. That was in 1953? A. Yes.

Q. Did you pick out in the Harqua Hala Valley at that time? A. No.

Q. Your first experience out there was in 1954, when you started picking?

A. That is right.

Q. What time of the year did you do that?

A. I believe it was in October.

Q. And you had been there, I assume, prior to October, sometime, in 1954? A. Yes.

Q. Do you recall when you first went out there in 1954?

A. It was a little before we started picking.

Q. Would it have been in September?

A. It could have been. I wouldn't swear to it.

Q. There is only one road out into the Harqua Hala country, isn't there, from Buckeye? [54]

A. No.

Q. How many roads from Buckeye?

A. Two.

Q. How did you go out that first time?

A. I took the road to the left.

Q. That is the road that goes past the Shepard property?

(Testimony of Ernest H. Otto.)

A. No. It just—the Shepard property, the one corner of it bumps into the road that you go by.

Q. Is that where the wells are? A. No.

Q. That is some other corner from there?

A. That is the furthest corner from the well.

Q. Who did you do business with out there in your first effort to get cotton picking business?

A. Gordon Cameron and Ed Swindle.

Q. Where are their farms in relation to the farms that Cal-Nine finally purchased from Shepard?

A. Gordon Cameron adjoined the Shepard place on the west, and Centennial Farms is, I would say, three or three and a half miles from there.

Q. Whose cotton did you pick first, if you remember?

A. Gordon Cameron's, on the place he had rented, not his home place.

Q. Did you pick any on his home place?

A. Yes. [55]

Q. When did you do that?

A. I would say that was in November.

Q. You had been over to his home place, then, I take it prior to that time? You were familiar with it?

A. One time we was at the house, yes.

Q. Had you had occasion to see the Shepard property as you drove by?

A. From the road, yes.

Q. Had you ever made any inspection of it at all? A. No.

(Testimony of Ernest H. Otto.)

Q. Were you at that time interested in purchasing it?

A. No, I didn't know it was for sale when I first came out there.

Q. You had occasion on a number of times to observe the Shepard property, though, as you picked cotton out there, you saw the crop growing?

A. No. When I was out there the crop was not growing any more.

Q. It was complete, is that right?

A. That is right.

Q. That was in September and October of 1954?

A. I would say in October, yes. In other words, they weren't irrigating any more at that time.

Q. Did you talk to Mr. Shepard about picking his crop that year? [56] A. No.

Q. When you were through with the cotton picking, did you go back then to California?

A. Yes.

Q. At that time, had you any notion of buying the Shepard property?

A. When I finished picking cotton, we already had it bought.

Q. When did you first get the idea of buying the Shepard property?

A. I would say it was some time in October, the later part of October.

Q. How did that come about?

A. Gordon Cameron and Ed Swindle, I got to know them pretty well, because I was working with them, and they told me, Why didn't I try to buy

(Testimony of Ernest H. Otto.)

a ranch over here. They said, "We need some more neighbors out here. We want to make this valley boom out here."

That is when I first got interested. They were telling me the Shepard place was for sale at that time.

Q. It was not due to any solicitation from Mr. Shepard that you bought the property?

A. No.

Q. Was that the first you talked to Cameron and Swindle about the property, and what it would do? [57]

A. Yes.

Q. And was that when Mr. Shepard told you about the farm being a good one, and that it had sufficient water, in his estimation?

A. Yes.

Q. And you had also gotten approximately the same information, apparently, from Mr. Swindle, is that right?

A. Yes.

Q. Had you talked to anybody else about the property before you went to see Mr. Shepard?

A. We talked to a real estate man, yes.

Q. Had you talked to Woody, Mr. Cameron's foreman?

A. Yes.

Q. Had you asked him how much water it would produce?

A. Yes.

Q. He told you about 70 to 75 tubes, isn't that correct?

A. Yes.

Q. You stated that is about the same thing Mr. Shepard told you, isn't that correct?

A. Yes.

(Testimony of Ernest H. Otto.)

Q. You said you saw Mr. Shepard some time in October of 1954, and talked about the land. I think you stated just he and you had that conversation, is that right? A. That is right.

Q. At that time he told you he wanted \$80,000 for it? [58] A. Yes.

Q. Did you attempt to make any inspection of the property?

A. It was some time after that I went over and looked at the property, yes.

Q. Did you go by yourself on that occasion?

A. Yes.

Q. Was anyone there when you arrived?

A. No.

Q. You looked over the entire property at that time, is that right?

A. I didn't walk over the whole thing, but I did walk around in the cotton, I think, there.

Q. You looked at the wells, the pump?

A. I looked at the pump. You couldn't see the well.

Q. You looked at the engine for the pump?

A. Yes.

Q. Did you see the tubes that were there?

A. Yes.

Q. All that was on the property and available for inspection? A. Yes.

Q. And you did inspect it? A. Yes.

Q. You finished picking some time in November of 1954, [59] is that right, or did you pick after that? A. No; we finished in January.

(Testimony of Ernest H. Otto.)

Q. Of 1955? A. Yes.

Q. Then some time in 1954 you left and went over to California; is that correct? A. Yes.

Q. And you saw Mr. Haas here who is your brother-in-law, is that right?

A. That is right.

Q. You told him you wanted to buy some property, and it was the Shepard property, is that correct?

A. I told him I sure would like to buy some land out there, because it looked like we could raise good cotton in that part of the country, and I told him there was a ranch for sale out in there. I heard there was a ranch for sale.

Q. At that time, had you had any business dealings with Mr. Shepard with regard to buying it, or just the one conversation?

A. Just the one conversation.

Q. And you and Mr. Haas decided at that time you would buy some Arizona property at that time, if it was possible to get it, is that right?

A. Yes.

Q. And you decided on this particular Shepard ranch, if [60] it was possible to buy it, is that right? A. Yes.

Q. Then you attempted to get some money from other friends, is that right? A. I didn't; no.

Q. Mr. Haas did? A. Mr. Haas did.

Q. And you accumulated \$2,000.00, is that right?

A. Yes.

(Testimony of Ernest H. Otto.)

Q. The rest of the fellows promised to put up some additional money along with yours?

A. That is right.

Q. And you took Mr. Haas over in September?

A. Yes.

Q. And you took him out and showed him the property, is that right? A. Yes.

Q. And while you were there, you ran into Mr. Shepard? A. Yes.

Q. Just met him on the ground, no appointment? A. Yes.

Q. Did you have an opportunity to see the well in operation? A. Yes.

Q. He turned it on? [61] A. Yes.

Q. Was that at your request, or was he using it for some other purpose?

A. He needed it at the time for a cotton picker.

Q. So he wasn't demonstrating to you; he was using it for his farming business?

A. Not especially. We asked him to start it up, and he said he needed some water anyway, so he started it, and then used it.

Q. And he was coming up to turn it on, was that his statement?

A. I don't remember if he made that statement.

Q. He did turn it on, and it ran awhile, and you observed it? A. That is right.

Q. Did you ask him any other questions at the time that you haven't related here today?

A. Not that I can think of.

Q. You did ask him what the output of the well

(Testimony of Ernest H. Otto.)

was, and he said Jules Turner estimated it at 2,400, and he said he didn't think it would do over 2,200?

A. He said it was doing 2,200.

Q. And you said in your estimation it was only doing about 2,000, is that right? A. Yes. [62]

Q. So you didn't believe his statement of 2,200, did you?

A. I did in a way, because I wasn't used to those big pumps where I come from in California. Nobody had a pump that size.

Q. You have already stated you could estimate reasonably the output of one of these wells, that is true? A. Yes.

Q. And it was your estimate it was doing about 2,000? A. Yes.

Q. You didn't rely on his statement of 2,200? You were relying on your own experience?

A. I thought Elmer knew what he was talking about.

Q. But you were relying on your own experience, weren't you?

A. To a certain extent, yes.

Q. You had also gone around and made inquiry as to what the well would do, in the way of capacity? A. Yes.

Q. Did you rely on those statements made to you? A. Yes.

Q. So it was not only the statements you got from Mr. Shepard, but also your own experience, and the statements of other persons that led you to believe it would do 2,000 gallons?

(Testimony of Ernest H. Otto.)

A. Yes. [63]

Q. Mr. Haas was with you at the time?

A. Yes.

Q. He didn't know anything about wells, I take it, and was not a farmer?

A. No; he was no farmer.

Q. You say you saw the water, and it was very silty, and dirty, is that correct?

A. That is right.

Q. I think in response to the judge's question as to what would happen to bowls when they had sand in them, you said they would wear out. You knew that, didn't you?

A. Not at that time I didn't know. Where I come from they pump water, not sand.

Q. After observing this dirty condition of the water, did you attempt to do anything about it?

A. No.

Q. You had seen Gordon Cameron's pump, hadn't you? A. Not the pump.

Q. Did you ever talk with him; did you ever discuss with him the fact that he had the same type of well?

A. We talked about the wells; yes.

Q. And he had told you Elmer's well was similar to his own, didn't he? A. That is right. [64]

Q. Did he advise you that you had silty water?

A. No.

Q. After seeing the silty water in Shepard's well, did you go back and discuss the matter with Cameron again?

(Testimony of Ernest H. Otto.)

A. No; I didn't think it was silty at the time. I thought it might have been a rust accumulation, or something like that, that would come from the pipe. All wells do that when they start up.

Q. Then you didn't make any inquiry at all about it, is that correct? A. No; I didn't.

Q. You say Mr. Shepard told you the well was gravel packed? A. That is right.

Q. Did you subsequently confirm that with Mr. Cameron, that he had put gravel in that well?

A. Not at that time, no.

Q. Did you afterward find out? A. Yes.

Q. And that was true, wasn't it?

A. No; that was not true. Gordon told me later, he said that well would have been all right, but Elmer never added any gravel to it, so that caused the thing to collapse.

Q. Mr. Cameron told you the well had collapsed, is that right? [65]

A. That is right; collapsed, or broke.

Q. Now, Mr. Shepard, at the time you were discussing this in September, said that the well was in good repair, is that right? A. Yes.

Q. Did he tell you when he had last repaired it?

A. Yes; he said when it was out of the hole they had repaired it.

Q. That was in the preceding July and August?

A. I forget. A short while before that.

Q. It hadn't been very long? A. No.

Q. I believe you said you never observed the well being operated after that one day when you

(Testimony of Ernest H. Otto.)

and Mr. Haas attended at the well site in September. I guess you never saw the well operated again until the following April, is that right?

A. That is right.

Q. Do you know whether or not it was ever run during that period of time? A. No.

Q. You were there until January in that area?

A. No; not all the time. I was back and forth with the cotton pickers.

Q. You never observed it running?

A. No; I don't think Elmer would have started it up for [66] that reason during that time of the year.

Q. As near as you know, that well was in the same condition in April, when you started it, as it was in November when you saw it, is that correct?

A. I would imagine, yes.

Q. Is it your testimony now that, apparently, it was producing the same amount of water in April that it was in November? A. Yes.

Q. Now, this down spout or hood, that was welded on the discharge pipe, is that correct?

A. Yes.

Q. That was perfectly plain to see, is that right?

A. Yes.

Q. As a matter of fact, that directed the water into the weir box, didn't it? A. Yes.

Q. How big was this flange that was in the pipe?

A. I would say 2 inches wide and 4 or 5 inches long.

Q. How big was the pipe itself?

(Testimony of Ernest H. Otto.)

A. 12 inches.

Q. Actually, it was only a small obstruction there, wasn't it? A. It was plenty big.

Q. And it held the water back, didn't it? [67]

A. That is right.

Q. So you wouldn't get as much water coming out if it hadn't been there?

A. No; it just made it look like it was coming out with more force, as far as I knew.

Q. Did you make any inquiry as to the purpose of the flange? A. After I bought the place.

Q. What did you find out?

A. I asked Gordon Cameron about it, and he kept laughing about it.

Q. Did he tell you what it was for?

A. He come out and told me what it was for. He said, "You're not that dumb. You can figure why Elmer had that put in there."

Q. You were present at Mr. Cameron's deposition, weren't you? A. Yes.

Q. Did he make that same statement there?

A. I don't know. I don't remember.

Q. Did you leave the flange in?

A. It was in for a while; yes.

Q. For how long?

A. I would say a couple of months.

Q. As a matter of fact, it was a good device for giving [68] additional cooling to the gearhead, wasn't it? A. No.

Q. It was not?

(Testimony of Ernest H. Otto.)

A. Absolutely not. They got a device on there for that.

Q. Pardon?

A. They got a device on there for that.

Q. That is a butterfly valve, is it, you are speaking of? A. That is right.

Q. Isn't it a fact on that particular machine if you put the butterfly valve over two notches, it would force water over the head?

A. How was that?

Q. If you put the butterfly valve over two notches on your particular pump, that it would force water up out of the top? It gave too much back pressure?

A. If you open the valve. If you didn't open the valve, it wouldn't force it any place.

Q. As a matter of fact, you didn't get very much back pressure with the butterfly valve up one notch?

A. We used the butterfly when we had water up on top, yes.

Q. So you did use this flange for a period of a couple of months?

A. We didn't use it. I just left it there. [69]

Q. Did you finally take it off? A. Yes.

Q. Who did you have do that for you?

A. A fellow by the name of Ed Dysart that was working for me.

Q. Who put out your tubes in April when you started your pre-irrigation? A. Woody.

Q. He was Cameron's foreman? A. Yes.

Q. How many tubes did you lay out?

(Testimony of Ernest H. Otto.)

A. We laid out 70 tubes, and we went along and started all these tubes.

Q. You didn't start with 55 tubes, is that correct?

A. Like I say, we laid out 70 tubes. We started on one side, we started all the tubes, and when we got through the first ones had stopped. We found out you couldn't run that many, so we ended up with 55 running.

Q. You started out with 70 tubes?

A. We laid out 70 tubes. We didn't start them.

Q. You didn't run any water through all 70?

A. We had 55 tubes running. That is how many.

Q. Then you had 15 tubes left over you didn't use?

A. Yes.

Q. Isn't it a fact Woody put out 72 tubes and started [70] them all running?

A. No.

Q. That is not true?

A. No, absolutely.

Q. You were there all the time?

A. That is right.

Q. Now, I think you stated that you and Mr. Haas, when you came over in November, executed this Option Agreement?

A. Yes.

Q. That was the entire agreement between you and Mr. Shepard, wasn't it?

A. No. That we had talked about, yes.

Q. You put everything down that was agreed to, what he was going to sell for, and the price you were going to pay?

A. Yes.

Q. You state you assigned this to the Cal-Nine Corporation, you and Mr. Haas?

A. Yes.

Q. That corporation was not in existence at the

(Testimony of Ernest H. Otto.)

time we are talking about? A. No.

Q. As a matter of fact, you and Mr. Haas didn't know at the time what kind of organization you were going to have, until you went back to California and he discussed it with a lawyer, isn't that right? [71]

A. We had discussed it before we come over here.

Q. You hadn't made up your minds what your operation would be?

A. After we bought the ranch, yes.

Q. Isn't it a fact you went back and discussed it with your lawyer in California, and at that time he advised you to form a corporation?

A. No, he told us that before.

Q. And then when you went back you had a lawyer form a corporation? A. That is right.

Q. And you assigned your option right to that corporation? A. I don't remember.

Q. Did you execute an assignment to the corporation?

A. I imagine we did. We did everything according to the way it was supposed to have been done.

Q. Do you know?

A. No, I don't. The lawyer was handling it for us.

Q. Did you bring over your corporate records?

A. How was that?

Q. Do you have your corporate records here now?

A. No.

Q. Have you sent for them? A. Yes. [72]

Q. Do you recall whether or not you and Mr. Haas received any consideration for this assignment after it was made?

(Testimony of Ernest H. Otto.)

A. We didn't get anything for it, no.

Q. I think you said after your talk with Mr. Shepard you had a second talk with him, then, in Buckeye, is that correct?

A. Yes, I talked to him in Buckeye.

Q. And you wanted some additional cotton allotment, or the deal was off, is that right?

A. When are you referring to?

Q. This talk in the Buckeye motel now.

A. No, not at that time. We just wanted some more cotton allotment. We didn't have the place bought yet then.

Q. You hadn't had the place bought?

A. No.

Q. And Mr. Shepard finally gave you some more cotton allotment, is that correct?

A. Not at that time, no.

Q. When did he do that?

A. Mr. Shepard told us there was 120 acres of cotton allotment on that ranch out there, and he says, "You guys will have at least 100 acres of cotton out here, because they are figuring on a 15% cut."

In other words, the 15%, he should have left us a little better than 100 acres of cotton allotment, so we went [73] through with the deal. And when we got finally our papers from this office, there was 70 some acres allotted to this ranch, not 100, so at that time we went to Mr. Shepard and said we didn't see how we could make payments on a ranch of that size with just 70 acres of cotton allotment.

(Testimony of Ernest H. Otto.)

So we told him we would rather lose the sale than take it like that. So he gave us a few acres more.

Q. So you made a new deal on this?

A. No. He just agreed to give us a few more acres of cotton.

Q. To save the deal? A. That is right.

Q. And the additional was this additional cotton acreage, is that right? A. Yes.

Q. You told him you would just as soon lose it as have that?

A. We told him we couldn't make the payments.

Q. So actually all you were entitled to on that land was 70 acres of cotton?

A. That's one way of looking at it, but we were promised better than 100.

Q. He was making that just as an estimate, wasn't he?

A. In a way it was just an estimate, but he led us to believe it was better than 100 acres. I don't think Elmer [74] meant it that way at all, but that is the way it turned out.

Q. As a matter of fact, you went down and got some additional acres from those people on a hard-ship basis, is that right? A. That is right.

Q. How much was that?

A. I forget, but we ended up with 105 acres of cotton.

Q. And you state when you started pumping, the well was pumping sufficient water, whatever the gallonage, to take care of that 105 acres, is that right?

A. If it held up.

(Testimony of Ernest H. Otto.)

Q. And that you noticed a gradual decrease in the production of the well? A. That is right.

Q. Mr. Shepard never made any guarantee to you that that well would continue in production, did he?

A. I kind of took it as a guarantee, what he told us.

Q. He told you what the future production of that well would be?

A. No, he said you will have plenty of water here to raise 220 acres of cotton.

Q. When the well gradually decreased, did you have anybody come out and inspect it? A. No.

Q. You said you talked to Mr. Cameron. Did he give you [75] any opinion as to what was happening to cause this gradual decrease in water?

A. Yes.

Q. Did he tell you the bowls were wearing out?

A. No.

Q. Nobody told you that? A. No.

Q. You didn't make any effort to find out if that was the matter? A. No.

Q. But you did talk to Mr. Cameron about getting some additional water if your well failed?

A. Yes.

Q. And that was somewhere in June or July?

A. Yes.

Q. He stated, he told you you would have to run the water out across the desert, and not across his land? A. Yes.

Q. You have stated you had a good crop in July?

(Testimony of Ernest H. Otto.)

A. Yes, the first of July.

Q. You had plenty of water, is that right?

A. Yes, plenty of water yet.

Q. That was approximately 9 months after you entered into this agreement with Mr. Shepard?

A. I don't know. [76]

Q. And you had been running the pump continuously for approximately a month at that time?

A. No. It was better than a month.

Q. About two months?

A. A month and a half, I would say.

Q. You never shut it off unless some mechanical trouble stopped you?

A. From that point on, yes.

Q. You spoke about the fact that these rains came. They came at the end of July, didn't they?

A. I don't remember.

Q. And lasted for approximately three weeks?

A. I think two or three weeks, yes.

Q. They got so bad at one time you were unable to get out on your property?

A. Yes, we couldn't cross the Centennial Wash. It was running.

Q. Your furrows were flattened out, weren't they? A. Yes.

Q. To the extent you started to furrow the place to get more water? A. Yes.

Q. You furrowed that? A. Yes.

Q. And you didn't put any more water on? [77]

A. Yes.

(Testimony of Ernest H. Otto.)

Q. And you decided not to use Gordon Cameron's? A. That is right.

Q. And your decision was you felt it would injure the crop? A. At that time, yes.

Q. And it wasn't because you couldn't get the water? A. No.

Q. You decided more water would damage the crop? A. At that time, yes.

Q. Did you ever try to put any more water on it then? A. When?

Q. After that time that you refurrowed?

A. Oh, yes.

Q. Where did you get that water from?

A. I had my pump running.

Q. And did that additional water damage the crop? A. From my pump?

Q. Yes. A. I wouldn't say so, no.

Q. You stated Mr. Cameron said you shouldn't spend 5, 6, or 7 thousand dollars working to repair the well, is that right? A. That is right.

Q. Did he advise you if you put new bowls and new impeller [78] blades in, you would bring it back up to normal?

A. No. He said it was absolutely useless to repair that well.

Q. He never looked in it to see?

A. He was in the year before.

Q. At that time they had deepened the well?

A. Yes.

Q. That was in 1953 that Mr. Cameron was in the well, wasn't it? A. I don't remember.

(Testimony of Ernest H. Otto.)

Q. It had been a year previous?

A. I think it was just before Elmer raised his last crop, whenever that was.

Q. And Mr. Shepard had raised, then, a full crop of cotton after Mr. Cameron had deepened the well?

A. That is right.

Q. And had also put in a new pump, new bowls?

A. That is what he told us.

Q. So Mr. Cameron had had no opportunity to investigate the well for a period of over a year?

A. I guess not.

The Court: We will suspend until two o'clock.

(The noon recess was taken.) [79]

Thursday, May 17, 1956, 2:00 P.M.

Cross-Examination

(Continued)

Mr. Burch: Will you read the last question and answer?

(The record was read as requested.)

Q. (By Mr. Burch): Mr. Otto, when was it that you had the pump pulled, I don't know that you ever told us, on the property?

A. I believe it was in November.

Q. That was approximately, then, one year after the purchase of the property, is that correct?

A. That is right.

Q. And to your knowledge, then, while you were

(Testimony of Ernest H. Otto.)

in possession during that period of time, no one examined the well, or did any repairs to anything down in the well, is that correct? A. No. [80]

Q. What is the situation there?

A. I mean, that is what it was.

Q. That is correct? A. Yes.

Q. After the pump was pulled, did you have any well expert or any examination made by any person as to the condition of the well, other than what you have already related in regard to the string being put in the well? A. Just Gordon Cameron.

Q. And what did Mr. Cameron do?

A. He didn't do anything.

Q. He didn't make any inspection of the well either, then, I take it, is that correct?

A. Yes, he was around there all the time.

Q. Did he make any inspection of the well at your request?

A. Well, I know he was there looking at it, and also when he was pulling the casing out, we could observe there wasn't any gravel around the casing at all.

Q. Did he tell you that, or did you make that observation yourself?

A. He said it, and I made the observation, too.

Q. How were you able to observe whether or not there was gravel around the casing?

A. There was just a big opening around the casing. You [81] could get the casing and just swing it around, I imagine, for 100 feet down, there was nothing around it.

(Testimony of Ernest H. Otto.)

Q. That was for the first 100 feet, then?

A. I am just estimating now, because you could just get the big casing and swing it around.

Q. What was down below you don't know, then, is that correct? A. No.

Q. This new well you drilled, it was not the same size well as the old one, was it? A. Yes.

Q. It was? A. Yes.

Q. Same width, same bore, everything?

A. When they drilled it, yes.

Q. Same depth? A. No, it was deeper.

Q. It was much deeper, wasn't it?

A. It was a couple hundred feet deeper.

Q. And you pay for wells by the number of feet of depth you drill, isn't that correct?

A. That is right.

Q. So this was a more expensive well than the other one?

A. No, I believe Gordon Cameron told me it would come to about the same thing. We put in smaller casing at the [82] bottom, but we had to add more gravel, so the cost would have been the same.

Q. You put in more casing in this new well than the old well, about 200 feet more? A. Yes.

Q. And you also made it a different type in that the perforations of the casing were placed differently, isn't that true? A. Yes.

Q. And you went below the silty area in that particular location, is that right? A. Yes.

Q. And you had larger casing up toward the top than in the old well? A. No.

(Testimony of Ernest H. Otto.)

Q. The same? A. The same thing.

Q. And you had gravel put in? A. Yes.

Q. You say there was no gravel in the old well?

A. We couldn't observe any gravel at all.

Q. So it was different in that respect, is that correct? A. I imagine.

Q. How much gravel did you put in?

A. 351 ton. [83]

Q. And you had the bowls pulled from the old well? A. Yes.

Q. They were worn out, weren't they?

A. Yes.

Q. Didn't Mr. Cameron advise you that was one of the reasons it wouldn't pump any water, because the bowls needed repairing?

A. I don't believe Mr. Cameron said anything about the bowls.

Q. What was your own observation? Were the bowls in any condition to pump water?

A. I wouldn't say so.

Q. That was one reason, then, it wouldn't pump water, the bowls needed repairing?

A. That was one reason.

Q. It might have been the reason, might it not?

A. I don't believe it would be all the reason.

Q. What was the water depth in the old well?

A. At what time?

Q. When you were pumping.

A. I don't know.

Q. You never made any effort to determine?

A. Elmer Shepard and Gordon Cameron told me

(Testimony of Ernest H. Otto.)

it was pulling down to the bowls, and the bowls were set at 380 feet, but I never measured them. You couldn't with the pump being [84] in there.

Q. So you don't know what happened to the water supply during the year you had possession of the property. A. I didn't follow?

Q. You don't know where the water level was on the property, is that correct? A. No.

Q. You said there was a third well on the property, that is correct, isn't it? A. Yes.

Q. Approximately 120 feet from the second well or old well? A. About 140 feet.

Q. You say that was covered?

A. That is right.

Q. At the time the floods came out there, you had your engine running constantly, is that right?

A. That is right.

Q. Isn't it true that the flood water got so high it came around the first well, and then the flood water poured into it? A. No, that isn't true.

Q. You told Mr. Thiebeau and Travis Shahan, and Mr. Brooks you had been ruined, isn't that true, when they inquired as to what the flood damage [85] was?

A. I don't know the men. I never heard the names before.

Q. You made no statement like that, to your knowledge? A. That is correct.

Q. You stated you refurrowed your cotton crop after the rains and flood in that area?

A. That is right.

(Testimony of Ernest H. Otto.)

Q. As a matter of fact, that flood damaged your crop heavily, didn't it? A. No.

Q. Isn't it true that after your well had been running for a period of a month or two, and particularly through that flood season, that your pump sank about 6 inches at that time?

A. That is right, gradually started to sink.

Q. And even so, you made no effort to cut it off, is that true?

A. No. Gordon told me just keep it running as long as it will run.

Q. I think you stated you felt \$80,000 was the value of the land, if it was in the condition Mr. Shepard represented it to be?

Mr. Rehnquist: We object as being an incorrect statement of the testimony.

Q. (By Mr. Burch): What was your statement with regard to the value of the land? Will you repeat it? [86]

Mr. Rehnquist: We object to that on the grounds there is no evidence, as we recall, that Mr. Otto has committed himself on the value of the land.

The Court: He may have. I don't remember.

Q. (By Mr. Burch): Mr. Otto, I think you referred to a conversation which took place between you, Mr. Shepard, Mr. Haas and a man named Woody, when you were together at the motel in Buckeye. Do you recall the testimony in that respect? A. Yes.

Q. Isn't it true that in the negotiations there, you agreed, as an additional consideration for Mr. Shep-

(Testimony of Ernest H. Otto.)

ard selling the property, to put up a house and a half mile of concrete ditch on the premises?

A. No, absolutely not.

Q. You do not recall a conversation of that nature? A. No.

Q. Did you construct a house on the premises?

A. No.

Q. Did you construct a half mile of concrete ditch? A. Yes.

Q. When was that?

A. I would say that was the first part of this year.

Q. Has that been paid for, incidentally?

A. No. [87]

Q. I think you stated you have never seen the Gordon Cameron's well in operation prior to your purchase of the Shepard property, is that correct?

A. That is correct.

Q. Isn't it true in your investigation of this property you saw Woody at Gordon Cameron's well and watched him operate that pump on a number of occasions? A. No.

Q. Isn't it true you inquired of him as to the condition of the well on the Shepard property, and didn't Woody tell you that the silt condition was the only objection to the well?

Mr. Rehnquist: We object to that on the grounds it is duplicitous.

The Court: It is what?

Mr. Rehnquist: Your Honor, it is duplicitous.

(Testimony of Ernest H. Otto.)

The Court: All right. Divide it up.

Q. (By Mr. Burch): Did Woody tell you prior to the purchase of the Shepard property that there was a silt condition in Elmer Shepard's well?

A. No.

Q. Isn't it true he told you that would be the only problem you would have with that well, was the bowls wearing out? A. No. [88]

Q. Isn't it true you saw Gordon Cameron's well in operation 15 or 20 times during the cotton picking season of 1954? A. No.

Q. Isn't it true you got water there for your cotton picking machines?

A. Yes, we got water out of a tank.

Q. And they had to run the pump to get the water, didn't they? A. Yes.

Q. You observed that? A. No.

Q. I think you stated Woody first started your well and pump for you when you first took over the operation of the property?

A. He was helping me.

Q. Isn't it true you set out 100 pipes?

A. Absolutely not.

Q. And you set out 72 two-inch pipes to start out?

A. I explained we set out 70, and started 55.

Q. Isn't it true you ran water through 72 pipes?

A. We started at the beginning of the ditch to start all these pipes, and we got to the end, to the 70 pipes, and they were all running when we started them. When we got back to the head of the ditch, they were stopping.

(Testimony of Ernest H. Otto.)

Q. Wouldn't they all run, all 72? [89]

A. Absolutely not.

Q. Isn't it a fact that you told him at that time you were pleased with the property? A. No.

Q. Isn't it true two or three weeks later when he came on the property you made the same statement to him? A. No, I don't recall.

Q. Isn't it true also that in your investigation of this property prior to purchase, you talked to the Arizona Engine and Pump people about the well?

A. Before I purchased this property?

Q. Yes. A. No.

Q. When did you talk with them about it?

A. About what?

Q. About the well.

A. Well, I can't recall the date, but it was sometime while we were farming, the man came out from Arizona Engine and Pump Company and inquired of me if I wanted to have their man come out on regular intervals and check my motor for me, and I said yes.

Q. Didn't Woody tell you prior to the time you purchased the property that Gordon Cameron's well and Elmer's were about in the same condition?

A. I can't recall he told me that. [90]

Q. You were on the Shepard property on two or three occasions prior to the time you took Mr. Haas out there, were you not?

A. No. Two times, I would say, yes.

Q. You were not prevented in any manner from inspecting the property or the machinery and the

(Testimony of Ernest H. Otto.)

equipment on it, were you? A. No.

Q. And at the time that you and Mr. Haas entered into the Option Agreement with Mr. Shepard, you were satisfied with your own investigation of the property, were you not? A. Yes.

Q. And you had relied on no one's statement of fact except your own investigation of what you could determine was true?

A. No, I relied upon all the information I got from my neighbors, and everyone else.

Q. From the neighbors?

A. And Elmer Shepard.

Q. Isn't it true when you had your conversation with Mr. Shepard in regard to the capacity of the well, you thought he was stretching it when he told you that there was 2200 gallons it would produce?

A. I had an estimate close to 2000, but I figured he knew what he was talking about. He owned the well. [91]

Q. My question was, you thought he was stretching it a little at that time, didn't you? A. Yes.

Q. I think you have stated you were unable to make any estimate as to the exact amount of gallonage it was pumping, is that correct?

A. You couldn't guess exact, I don't think.

Q. At the time you took over in April, did it appear to be pumping any less than, or any more than it had when you looked at in November, 1954?

A. It looked like it was pumping the same amount at that time.

Q. It looked like it was pumping the same amount? A. Yes.

(Testimony of Ernest H. Otto.)

Q. It was only after you did operate it, after you had operated it for awhile that the capacity of the production of the well seemed to diminish, is that correct? A. That is right.

Q. That was not a sudden diminishing, but a gradual reduction in capacity, wasn't it?

A. Yes.

Q. And that continued over a number of months?

A. Yes.

Q. As that condition continued, you kept using the well and made no effort to repair it, is that [92] right? A. Yes.

Q. Nor did you make any effort to determine the cause of that diminishing production, what the cause was? A. Yes, through Gordon Cameron I did.

Q. Through Gordon Cameron you did. And that was really by the process of asking Gordon Cameron what his opinion of the cause was, is that correct?

A. That is right.

Q. And you made no effort to ascertain by any investigation of the well itself? A. No.

Q. I think I asked you earlier this morning whether or not you had made an assignment, you and Mr. Haas, of your interest in the option to the Cal-Nine Corporation.

Have you had your memory refreshed in that respect? A. Yes.

Q. And did you make an assignment?

A. Yes.

Q. And when was that assignment made?

(Testimony of Ernest H. Otto.)

A. This one?

Q. The one today, is that correct?

A. That is right.

Q. And that is the first such assignment that has ever been made, isn't that true?

A. We didn't have anything on paper. It was just verbal. [93]

Q. The Cal-Nine Corporation has never made any acceptance of that assignment, or known anything about it, as a corporation, isn't that true?

A. No.

Q. You mean by No that Cal-Nine does not know of this assignment officially yet, is that your answer?

A. Outside of the vice president.

Q. Is that assignment here in the courtroom at this particular time?

Mr. Rehnquist: Here it is. (Handing to counsel.) We will be glad to offer that now.

Mr. Burch: I believe that is all.

Redirect Examination

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 8 for identification.

(Said Assignment was marked as Plaintiff's Exhibit 8 for identification.)

By Mr. Rehnquist:

Q. Handing you Plaintiff's Exhibit 8 for identification, is this the assignment about which you were just cross-examined? A. Yes.

(Testimony of Ernest H. Otto.)

Q. And is that your signature? A. Yes.

Mr. Rehnquist: I offer it in evidence.

Mr. Burch: If the Court please, we are going to object [94] to any assignment. At the beginning of the trial this morning we were in receipt of the trial memorandum prepared by counsel for the Plaintiff, and we would like to submit herewith a Memorandum of authorities for the benefit of the Court with respect to this particular point that is coming up.

I note in the Memorandum counsel furnished us, there was no Arizona case in point. We do have one which says a cause of action for fraud or deceit is a personal thing that cannot be assigned to a corporation, and particularly which we feel was not in existence at the time of the fraud or deceit complained of.

We cite other authorities along that line. We feel there is no basis for this Assignment today to be put into evidence. It certainly can't assign to that corporation something that is in the way of a right of action, that it did not have at the commencement of this action, and it is attempting to assign to them a cause of action arising prior to its existence.

I believe, with the authorities, the Court will sustain us in each of these points.

The Court: All right, it may be received subject to your objection.

The Clerk: Plaintiff's Exhibit 8 in evidence.

(Said Assignment was received in evidence and marked as Plaintiff's Exhibit 8.) [95]

(Testimony of Ernest H. Otto.)

Q. (By Mr. Rehnquist): It was brought forth from you on cross-examination, Mr. Otto, that at the time the pump was pulled, the casing could be swung a distance of 100 feet.

Did you mean by that a distance of 100 feet in diameter, or 100 feet down the well?

A. Down the well.

Q. So that your view down the well was just about 100 feet, is that correct?

A. Yes, I would say that.

Q. And it was in that distance that you could see no gravel? A. That is right.

Q. When you turned the pump on in April for pre-irrigation, how soon after that did you notice the decrease in the well?

A. Oh, I would say in a week or ten days we noticed it was pumping less water.

Q. Did you immediately notice that the output of the well was considerably less than 2,220 gallons a minute?

A. I knew it was less, yes, as soon as we started irrigating.

Q. How soon after he turned the pump on did you start irrigating?

A. I started irrigating immediately after he turned the pump on. [96]

Q. Do you know where your new well is drawing from?

A. The pump company checked that, and they said 200 feet.

(Testimony of Ernest H. Otto.)

Q. And how far is that new well from the well we have been discussing here?

A. About 125 feet.

Q. Do you know the cost of pulling the pump in a well to examine the well?

A. You mean just to pull it out and look at it and put it back in?

Q. Yes.

A. I would say it would be close to \$1500.

Mr. Rehnquist: No further questions.

Recross-Examination

By Mr. Burch:

Q. There was one other matter, Mr. Otto.

When you and Mr. Shepard and Mr. Haas, I believe it was, went to the lawyer's office in Buckeye, you went to Mr. Towner's office, is that correct?

A. That is right.

Q. And you dictated the Option Agreement to him at that time, is that correct?

A. I believe Elmer did.

Q. And Mr. Towner is the lawyer?

A. That is right.

Q. He is the statutory agent for your corporation, isn't [97] that true? A. That is right.

Mr. Burch: I believe that is all.

Mr. Rehnquist: No questions.

(Witness excused.)

ELMER F. SHEPARD

called by the Plaintiff as a witness for cross-examination, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Rehnquist:

Q. Will you state your full name, please?

A. Elmer Francis Shepard.

Q. You have already been sworn in this action, Mr. Shepard?

A. Yes.

Q. You are one of the defendants?

A. Yes.

Q. Where do you live?

A. Buckeye.

Q. How long have you lived there?

A. 37 years.

Q. Is that all your life?

A. Yes.

Q. What is your occupation?

A. Farmer. [98]

Q. How long have you been a farmer?

A. Oh, for 13, 14 years.

Q. What has your experience in farming consisted of, with regard to crops? What crops have you farmed?

A. Grain, cotton, alfalfa.

Q. How long have you farmed cotton?

A. About three years myself, and I have been associated with it about six years.

Q. Prior to January of 1955, did you own the north half of Township One North, Range Nine West?

A. What section?

Q. I am sorry.

A. Section 21?

Q. Section 21.

A. Yes.

Q. And this is the land you sold to Cal-Nine

(Testimony of Elmer F. Shepard.)

Farms? A. That is right.

Q. When did you purchase that land, Mr. Shepard? A. I think it was probably in 1952.

Q. Was there any well on it then?

A. No, raw ground.

Q. Did you put one in? A. Yes.

Q. Do you remember about when you put that first well in? A. Sometime in September. [99]

Q. Of what year. A. 1952.

Q. What happened to that well?

A. Put in too light a casing, it collapsed when it was being perforated. The perforator hung and ripped a section out of it.

Q. Did it collapse from pumping too much sand?

A. I wouldn't know. It was injured by the perforator. We found it had too light a casing in it.

Q. Is it your statement that the pumping of sand had nothing to do with the collapse of that well?

Mr. Burch: I don't see what that has to do with this case. I don't see what probative value it has.

Mr. Rehnquist: It is generally relevant, what you might expect out of a well. There is testimony this is 140 feet or 120 feet away from the well in question here.

The Court: Go ahead.

The Witness: Well, it might have had some bearing. I wouldn't know.

Q. (By Mr. Rehnquist): You don't think it had any bearing? A. It could have had.

Q. How long had this well been in operation when it collapsed? [100]

(Testimony of Elmer F. Shepard.)

A. Oh, probably hadn't been pumped over a week.

Q. Did anyone ever tell you what caused its collapse? A. No.

Q. Did Mr. Cameron ever make any statement to you? A. Never did.

Q. He didn't drill that first well, did he?

A. No.

Q. He never made any statement to you at the time of drilling the second well as to what caused the collapse of the first well?

A. I don't believe so.

Q. When was this second well drilled, to the best of your recollection?

A. Sometime in 1953, in April or May.

Q. How far away was this from the first well?

A. About 120 or 30 feet east.

Q. And this second well was the well on the property that was in operation at the time you sold the land to Cal-Nine?

A. Yes, it had been in operation two years.

Q. How many years did you farm the land you sold to Cal-Nine?

A. I had a lease deal the first year, and I farmed it one year prior to the sale myself.

Q. And who was the lease to the first year? [101]

A. It was a sharecrop deal, Claude Sanders.

Q. Wasn't it actually farmed by a partnership consisting of yourself and Claude Sanders?

A. I think it went into a partnership before it was over with.

(Testimony of Elmer F. Shepard.)

Q. What did you raise on that farm the first year? A. Cotton.

Q. And the second year?

A. The second year I farmed it and grew cotton.

Q. How many acres did you plant to cotton in 1953? A. 310.

Q. And how many bales an acre did you make?

A. I don't have those records. He has those records.

Q. What is your best recollection as to that?

A. Oh, about a bale, I imagine.

Q. Could it have been less than a bale?

A. It could have. I don't know.

Q. And how many acres did you plant to cotton in 1954? A. 211.

Q. How many bales to the acre did you make that year?

A. Approximately a bale and seven-tenths.

Q. Land with a good well on it is worth more than land with a bad well on it, isn't it, Mr. Shepard?

A. I imagine so.

Q. Would you say that the condition of the well on the [102] land is an important element in determining the value of the land out there?

A. I imagine it would be.

Q. Did you have a conversation with Mr. Ernest Otto and Henry Haas in the fall of 1954 about selling this property to them?

A. What about? On the ranch, or in town?

Q. If you will just answer the question we can pin it down. Did you have a conversation?

(Testimony of Elmer F. Shepard.)

A. Yes.

Q. Was this conversation out at the ranch?

A. The start of the conversation was at the ranch.

Q. What do you mean when you say the start of the conversation was there. Did you all drive back to town?

A. They asked me if it could be bought, and we was to meet in at the motel that evening and talk over the deal.

Q. So you had one conversation out at the ranch, and another one in at the motel?

A. A very short conversation at the ranch.

Q. And was anyone participating in the conversation besides you, Mr. Haas, and Mr. Otto?

A. No.

Q. Was anyone within earshot, so that he could have heard that conversation?

A. I don't know. One picking machine was close by. [103] I don't know whether the man heard the deal or not.

Q. Do you know who the man was operating that machine?

A. Curtis Holloway.

Q. At that time, you knew both Mr. Otto and Mr. Haas were from California, didn't you?

A. I heard they were from California.

Q. And you knew they planned to raise cotton on this land at the time they bought it?

A. I didn't know.

Q. Did you suspect that they wanted to raise cotton on it?

A. I suspect, because cotton base is very valuable.

(Testimony of Elmer F. Shepard.)

Q. Did they discuss cotton with you?

A. They asked the number of acres that would probably go with the place, and I couldn't give them an accurate figure because every year the government sets the allotment.

Q. Did either Mr. Otto or Mr. Haas make any inquiry about the well on this property at this time?

A. One of them, I don't remember which, asked what I thought the well would throw, and I told them it had never been measured, that I couldn't say exactly. I told them a neighbor had made an estimate of 2,400 gallons, but I didn't think it would throw over 2,200 at the most.

Q. Who was that neighbor?

A. Jules Turner. [104]

Q. You stated it would throw 2,200 gallons, is that true?

A. I said I didn't know whether it would throw over 2,200. It was an approximate guess. I told them they could look at the tubes. It had never been measured.

Q. But that was your best guess at the time, 2,200 gallons?

A. That is right.

Q. How did you arrive at that guess?

A. About the same way Otto arrived at the 2,000-gallon estimate, by observing the water come out at the end of the pipe.

Q. Did you also speak about the capacity of the well, in terms of tubes?

A. I told him he might be able to judge by the number of tubes it was running.

(Testimony of Elmer F. Shepard.)

Q. Did you tell him the number of tubes it was running? A. Yes.

Q. What number was that?

A. I told him we started with 70, and as the season progressed, we reduced to about 55.

Q. When you say "reduced to 55," you mean the well wouldn't run any more at that time?

A. No. We pumped the water up, in order to force the water to run fast, we ran trial runs.

Q. I presume you are referring to the 2-inch siphon [105] tubes when you made that statement?

A. Two-inch. Some of them had inch-and-a-half plugs. I don't know how many.

Q. Actually, there is quite a difference between an output that will run 70 two-inch tubes and 70 one-and-a-half-inch tubes?

A. The 70 were two-inch.

Q. That is what you were talking about in terms of the well running 70 tubes?

A. That is right.

Q. You meant two-inch tubes? A. Yes.

Q. Did you regard the well and equipment to be in good condition at this time?

A. It should have been. I had it checked every two weeks.

Q. And you did regard it as being in good condition at that time? A. Yes.

Q. Did you tell Mr. Otto and Mr. Haas it was?

A. They asked what condition it was, and I told them exactly what I am telling you, that it had been checked every two weeks during the pumping season.

(Testimony of Elmer F. Shepard.)

Q. Did you tell them anything more about things that had gone wrong with the well? [106]

Mr. Burch: If the Court please, I think that assumes a fact not in evidence.

The Court: I didn't know anything had gone wrong with it.

The Witness: I don't remember whether they even asked, or not. They seemed to have all the information that they needed when they approached me for the purchase of the place, they seemed to have all that information.

Q. (By Mr. Rehnquist): Did you tell them anything about having the pump pulled previously?

A. If they asked me, I did. I don't remember.

Q. Did you tell them anything about Mr. Cameron going back into the well?

A. Yes; they knew it had been deepened a year before.

Q. But you don't remember whether or not you told them anything about the pump ever being pulled?

A. I can't recall whether I did or not.

Q. If they had asked you, would you have told them?

A. I would have told them, because it was on the records of the tract. They could have found it if they so desired.

Q. Did you have any reason to believe that the output of the well was decreasing at this time?

A. At what time?

Q. At the time of this conversation in [107] No-

(Testimony of Elmer F. Shepard.)

vember. A. That it would decrease, no.

Q. What exactly had you had done to the pump and equipment from the time that this second well was drilled, Mr. Shepard, other than routine checks?

A. Well, the first time we thought it was something wrong with the engine, and had the engine checked.

The engine people said it was in the pump, so we pulled the pump, and they gave that a good check and put it back in the hole, and it was doing the same thing, so then we called out the head mechanic, and he found it was the gas pressure, the natural gas engine and the distributor mag head, and that was repaired, and it went right on. That was all there was to it.

Q. So there was nothing wrong with the pump that time?

A. They sent it in, they always take it in to check it. I don't know exactly what they did do to it. They might have made some minor repairs.

Q. It would just be minor repairs, is that correct? A. I think so.

Q. Was the pump pulled on any other occasion from May, 1953, to November, 1954?

A. It was pulled in August.

Q. What was the reason for pulling it then?

A. Broke an oil shafting.

Q. In the pump? [108] A. Yes.

Q. And what was done to it?

A. It was repaired.

Q. Anything wrong with the bowls at that time?

(Testimony of Elmer F. Shepard.)

A. I sent them in and had them checked. Whatever had to be done, it was done. I wasn't in there when it was repaired.

Q. Any other occasions on which you had trouble?

A. I think that was about the size of it.

Q. You are sure there was not any more serious trouble on that on any other occasions?

A. On the equipment?

Q. On the equipment.

A. Not that I recall, not that I can think of.

Q. Did you tell either Mr. Otto or Mr. Haas in November that there was plenty of water on that land for 2,200 acres of cotton? A. No.

Q. Did you believe that there was?

A. I had every reason to believe that there was. We had just finished a 211 acre crop, at a bale and seven-tenths.

Q. Is that considered a good output of cotton, a good number of bales per acre?

A. I think so.

Q. How does it compare with the standard of the neighbors [109] around there, if you know?

A. That was either high in that area, or next to high on planted cotton.

Q. Were you served with a subpoena in this action, Mr. Shepard? A. Yes.

Q. And did I request you to bring certain documents with you? A. That is right.

Q. Do you have those? A. Yes.

Q. Are these the records that you brought with you? A. Part of them.

(Testimony of Elmer F. Shepard.)

Q. Are they all the records pertaining to State Tractor & Equipment Company's services to the equipment? A. I think so.

Mr. Rehnquist: Could we have these marked for identification?

The Clerk: Plaintiff's Exhibit 9 for identification.

(Said Statements were marked as Plaintiff's Exhibit 9 for identification.)

Q. (By Mr. Rehnquist): On this first sheet, September 2nd, 1954, does that simply represent the routine check?

A. "Check and set valves, plugs, timing, mag."

Q. And the total was \$12.50? [110]

A. Twelve dollars and a half.

Q. This second sheet, August 3rd, 1954, that is the time you spoke of when you had the pump pulled?

A. Yes; I think that was when we pulled it.

Q. If it said on this sheet, "pull customer pump and repair bowls as required," that would be a correct statement of the work done?

A. That is right. It was sent in, and anything that needed to be fixed, they fixed.

Q. Are you acquainted with Mr. Vern Tower?

A. Yes.

Q. Is he the man in charge of State Tractor's working on your place this time?

A. Vern is a salesman.

Q. Did he participate in this repair work?

(Testimony of Elmer F. Shepard.)

A. No; not in the repair. That was done in the shop.

Q. Did he come out to your land on behalf of State Tractor and confer with you about your pump in August of 1954?

A. I don't know whether he did or not. That is so far back I couldn't remember who was there.

Q. Was he the man that generally came out to see you for State Tractor?

A. He was the general representative for that area.

Q. You can't think of anyone else who might come out [111] for State Tractor at that time?

A. Yes; I can. The people who pulled the pump.

Q. Who would have been working under Mr. Tower?

A. Out of Arizona Engine & Pump.

Q. Was Arizona Engine & Pump organized at this time?

A. It was State Tractor at that time.

Q. So the bowls were repaired in August, August 3rd of 1954?

A. That is right. Anytime you pull a pump out of a hole, if there is the least thing wrong with it, it should be repaired.

Q. What had been the output of the well immediately prior to pulling this pump?

A. Immediately prior?

Q. Yes.

A. I imagine it was pumping the same up until the time the tubing broke.

Q. And what do you mean by "the same"?

(Testimony of Elmer F. Shepard.)

A. The same gallonage it had been pumping had it reduced down to 55 tubes.

Q. But then no part of the reason for having this repair work done was a decline in the output of the well?

A. No; the tubing broke and froze the shafting.

Q. Did you confer with Mr. Tower at this time about what sort of steps should be taken to repair the pump? [112]

A. No; because Mr. Tower wouldn't know anything more about it than I did, until it was pulled out of the hole.

Q. Did you confer with him after it was pulled out of the hole?

A. I don't remember. I don't think so.

Q. If you had conferred with him, you would have followed his advice, I take it?

A. Not necessarily.

Q. You might not have followed his advice on this occasion?

A. There are many people with State Tractor whose advice I would have followed more than Vern Tower, because he was a salesman.

Q. Did Mr. Tower tell you at the time you should have the bowls replaced? A. I don't think so.

Q. You probably would have remembered, if he had?

A. I don't know as I would have. He was always trying to sell something or other. He was a salesman.

Q. You don't remember his telling you you should have the bowls replaced at this time?

(Testimony of Elmer F. Shepard.)

A. No; I don't.

Q. This next sheet, July 23rd, 1954, what does that represent? A. This one? [113]

Q. Yes.

A. "Got exchange starting clutch"—

That is the little motor on the big motor. The clutch had worn some, and we took the small motor off and I put the clutch on myself.

Q. And the total bill there is \$121.89?

A. That is right. Had to bring the old one to the shop to be repaired. It was an exchange deal. I exchanged it on the new one.

Q. And the total bill on this was \$892.80?

A. That is right.

Q. Then July 8, 1954, another fairly minor thing?

A. "Check and set valves, plugs, timing and install service mag. Plus parts, plus repair of mag." That is a routine check.

Q. And the total bill there? A. \$38.03.

Q. Now, these records, I notice, Mr. Shepard, pertain only to 1954. The subpoena calls for your 1953 records, too. Do you have those?

A. I don't have those. Those are probably sent to the boy that was sharecropping.

Q. They wouldn't have come to Sanders and Shepard?

A. Probably Sanders and Shepard, but they would send them to him. [114]

Q. They would send them to him. Do you recall any trouble that was had with the well that summer of 1953?

(Testimony of Elmer F. Shepard.)

A. 1953, the last two years back from—yes, we wasn't satisfied with the performance of the bowls, so we pulled the pump and put a different type bowl on, and then enclosed the impeller in 1953.

Q. What caused your dissatisfaction with the performance of the bowls?

A. Well, we didn't think that—the impeller seemed to be more efficient, and it was standing abrasive substance better.

Q. Such as sand? A. Silt.

Q. Had the output of the well dropped seriously at the time you went in there in 1953?

A. No. I might add, Gordon Cameron, I believe, put on the same type bowls. It was recommended to put that type bowls in.

Mr. Rehnquist: We offer Plaintiff's Exhibit 9 for identification in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Said statements were received in evidence and marked as Plaintiff's Exhibit 9.)

Mr. Rehnquist: Will you mark these for identification? [115]

The Clerk: Plaintiff's Exhibit 10 for identification.

(Said statements were marked as Plaintiff's Exhibit 10 for identification.)

Q. (By Mr. Rehnquist): Did you have any other trouble that summer of 1953 besides this time that you replaced the bowls?

(Testimony of Elmer F. Shepard.)

A. Well, I will tell you. He was the head farmer out there that year. There was a lot of times I wasn't even out.

Q. I presume if you had occasion to pay a thousand dollar bill to State Tractor, you would know?

A. If it was anything serious, I would have been there.

Q. It is just the minor service checks you wouldn't know about? A. That is correct.

Q. One more question on that 1954 records. Those are all the statements you received for 1954?

A. That is all I could find. As far as I know, that is it.

Q. And you don't recall any other serious trouble you had in 1954, or any other big amount you paid to State Tractor?

A. Not on that season, no. Let's see. There could be a bill the time they pulled it out and found it was the gas pressure. I don't know whether that was in there or not.

Q. Do you remember when that was?

A. It was some time prior to the August. [116]

Q. They didn't do anything to the bowls at that time?

A. They have to take them in to break them open. If there was the least thing wrong, they fixed it. Whenever you have \$23,000 tied up in machinery and the cotton crop depending on it, if there was anything slightly damaged, it is a good policy to replace it.

Q. Handing you Plaintiff's Exhibit 10 for identification, the first sheet, March 9th, 1953, it is ad-

(Testimony of Elmer F. Shepard.)

dressed to Sanders & Shepard, that was the partnership under which you were farming? A. Yes.

Q. Do you recall receiving a statement like that from State Tractor & Equipment Company for \$1,550.79? A. That is when?

Q. March 9, 1953?

A. I don't know whether I got one, or whether Sanders got it.

Q. But one of you probably got it?

A. Oh, yes; one of us would have gotten it.

Q. If that is what State Tractor's records show, it got to either you or Mr. Sanders?

A. That is right.

Q. And that is for \$1,550.79?

A. That is right.

Q. The second sheet, dated June 30, 1953, would this have [117] been the time you had the trouble with the engines?

A. No. As you can see there, that was the mufflers that was put on the engines, \$313.00.

Q. That whole account is for the mufflers?

A. It says right up here, mufflers.

Q. I was wondering if that was covering the whole thing?

A. It covers the whole thing.

Q. Then a statement appears on the top——

A. It is listed here, "Superior (Mufflers). \$305.93. Tax, \$7.65; \$313.58."

Q. In July 22, 1953, a statement for \$1,962.00. Was this that time you referred to that you replaced the bowl material?

(Testimony of Elmer F. Shepard.)

A. Well, I will tell you. He was the head farmer out there that year. There was a lot of times I wasn't even out.

Q. I presume if you had occasion to pay a thousand dollar bill to State Tractor, you would know?

A. If it was anything serious, I would have been there.

Q. It is just the minor service checks you wouldn't know about? A. That is correct.

Q. One more question on that 1954 records. Those are all the statements you received for 1954?

A. That is all I could find. As far as I know, that is it.

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A. Not on that season, no. Let's see. There could be a bill the time they pulled it out and found it was the gas pressure. I don't know whether that was in there or not.

Q. Do you remember when that was?

A. It was some time prior to the August. [116]

Q. They didn't do anything to the bowls at that time?

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(Testimony of Elmer F. Shepard.)

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Q. But one of you probably got it?

A. Oh, yes; one of us would have gotten it.

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Q. And that is for \$1,550.79?

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Q. In July 22, 1953, a statement for \$1,962.00. Was this that time you referred to that you replaced the bowl material?

(Testimony of Elmer F. Shepard.)

A. You are going back so far there that it is almost impossible for me to tell one bill from the other. It could be.

Q. You will notice here it says, "1/4 stage Fig. 6922 Bowl Assembly, 767 Bronze Impellers."

Wasn't that about the kind of work you described taking place in the summer of 1953?

A. Yes; probably so. At that time I didn't know much more about the workings of a pump than you do.

Q. That is mighty little.

A. That is why I had that man farming for me. I didn't understand that. [118]

Q. Presumably if State Tractor's record showed that, that would be a correct statement?

A. Yes.

Q. You also had some service from State Tractor in connection with Mr. Cameron's deepening in the winter of 1953-1954, did you not?

A. Yes; I think they put the pump back in.

Q. And they also pulled it, did they not?

A. I think they pulled the pump. Gordon moved the engine.

Q. So this statement from State Tractor & Equipment Co. to Sanders & Shepard of January 25, 1954, for \$798.64, that would be for pulling and reinstalling the pump?

A. Yes; I think so. "Pull customer's pump and lay on the ground. Reinstall after well is deepened. Clean up bowls."

(Testimony of Elmer F. Shepard.)

Q. That is the correct statement of the work they did at that time?

A. \$798.64. As far as I know, that is what it is.

Q. Then on February 22, 1954, you received a statement from them for \$1,072.07?

A. February 22nd, 1954. "Move engine and install on new foundation."

Oh, when he deepened the well, he injured the former engine foundation, and we had to put in another one. That was [119] when the pump was put back in the deepened well.

Q. That was still in connection with the deepening of the well by Mr. Cameron?

A. Mr. Cameron was through. He had already moved off, and we were putting the pump back in. That is the bill for putting the pump back in.

Q. Then this next sheet, May 18, 1954, a bill for \$1,064.43, were the bowls repaired at this time?

A. Fifth month, 18th day, 1954. That was along in May. This is a bill, this is the time, I suppose, that they made a mistake, and finally found that it was the gas pressure on the engine.

Q. So there was no need to repair the bowls at that time?

A. They always clean them up and find something to do.

Q. It was not necessary to remove the pump for the purpose of repairing the bowls?

A. It turned out to be the same thing when they put it back in the hole. It was fluctuation in the gas pressure.

(Testimony of Elmer F. Shepard.)

Q. And there was no decrease in the output of the well that caused you to have it gone back into?

A. Absolutely not.

Q. And this August 3rd, 1954, statement, \$892.80, that is the same thing we went over?

A. Yes; that is the same thing, I guess.

Mr. Rehnquist: We offer Number 10 in [120] evidence.

Mr. Burch: No objection.

The Clerk: Plaintiff's Exhibit 10 in evidence.

(Said statements, State Tractor & Equipment Company, were received in evidence and marked as Plaintiff's Exhibit 10.)

Q. (By Mr. Rehnquist): Then it is your statement, Mr. Shepard, that on none of these occasions when the pump was pulled was there any decrease in the output of the water that caused you to pull it?

A. Naturally, there could have been some decrease. It might not have been noticeable to the eye.

Q. How much decrease could there have been?

A. I couldn't state that.

Q. Could it have been 100 gallons a minute?

Mr. Burch: If the Court please, that is highly speculative.

The Court: The witness says he can't answer. Why waste time with that?

Q. (By Mr. Rehnquist): Did you ever have any difficulty with the cooling system of the engine on the pump? A. Yes; some.

Q. What was the problem?

(Testimony of Elmer F. Shepard.)

A. Well, in order to make the exchanger perform efficiently and circulate the right amount of water through the [121] gearhead to keep the gearhead cool, you should have some, you should use your butterfly valve, or have some kind of installation to hold it up over the coil. The coil is a good deal like the radiator in a car. It should have water completely over the top of it.

Q. Why did you request Mr. Cameron to go back into your well less than a year after it was dug?

A. I figured that he might cure some of the silt condition, and probably develop a better well.

Q. Did you regard the well as unsatisfactory prior to Mr. Cameron's going back into it?

A. I didn't think so. I wouldn't have deepened it if I hadn't thought the well had produced a crop.

Q. You weren't satisfied with its performance, though, were you? A. Oh, no; not entirely.

Q. How much did you pay Mr. Cameron to go back into the well?

A. I think I paid him \$5.00 a foot.

Q. How much was his total bill for those services in deepening the well?

A. I wouldn't know. I think the bill is over there. Mr. Burch has the bill.

Mr. Rehnquist: May this be marked for identification?

The Clerk: Plaintiff's Exhibit 11 for identification.

(Said statement, Gordon Cameron, was marked as Plaintiff's Exhibit 11 for identification.) [122]

(Testimony of Elmer F. Shepard.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 11 for identification, is this the statement you received from Mr. Cameron for his services in opening the well? A. That is right.

Q. And that is in the amount of \$6,039.83?

A. \$6,217.61.

Mr. Rehnquist: Oh, \$6,217.61. We will offer it in evidence.

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(Said statement, Gordon Cameron, was received in evidence and marked as Plaintiff's Exhibit 11.)

Q. (By Mr. Rehnquist): Had the output of the well decreased substantially from the 2,000 or 2,200 level at the time you asked Mr. Cameron to go back into it?

A. No. We had completed the crop, and we was trying for a bigger well, more water.

We was through with the crop, and we had some time, and we figured we might make a 3,000-gallon well out of it, or better, because there are some 3,000-gallon wells in that territory.

Q. You were willing to pay \$6,000 just to make a good [123] well better? A. That is right.

Q. That was the main purpose of Mr. Cameron's going back in to deepen the well? A. That is it.

Q. Do you know the output of the well, or could

(Testimony of Elmer F. Shepard.)

you estimate the output of the well in gallons per minute just before Mr. Cameron went in?

A. No; I couldn't.

Q. You don't have any idea what it was putting out? A. No.

Q. Were you present during part of the time Mr. Cameron had his rig there?

A. Most of the time.

Q. Were you aware they struck an obstacle at about 477 feet? A. I certainly was.

Q. Mr. Cameron did deepen the well at this time?

A. That is right.

Q. How much, do you know?

A. Well, I think he went from 1,033 to 1,375, or close to 1,375, I believe it was.

Q. Was this added depth cased? A. No.

Q. To your knowledge, did water come in through this [124] added depth?

A. I wouldn't know that. That is 1,373 feet below the surface.

Q. Do you know what the output of the well was when Mr. Cameron got through and got the pump back out?

A. About the same as it was before.

Q. You stated you had no idea at all what it was before, is that correct? A. Not exactly, no.

Q. So you have no idea what it was afterwards, either? A. Not exactly.

Q. Could you make an estimate?

A. Well, I didn't figure it was pumping over 2,200.

(Testimony of Elmer F. Shepard.)

Q. Did you figure it was pumping under 2,200?

A. It would have been either 2,200 or under. It was not over.

Q. How far under could it have been?

Mr. Burch: We are going to object to speculation again. The man has answered to the best of his ability.

The Court: He said he doesn't know.

The Witness: There is no water device that has been manufactured yet that will measure a well within five feet of the true capacity.

Q. (By Mr. Rehnquist): You are capable of estimating, aren't you? [125]

Mr. Burch: The Court has ruled on it, Mr. Shepard.

The Court: Yes.

Q. (By Mr. Rehnquist): Is it your statement the output of the well has been pretty constant from up to the time it was drilled until the time you sold it?

A. That is right.

Q. The discharge pipe had an elbow spout on it when you sold the property, didn't it, or a bonnet?

A. A bonnet.

Q. When was that put on, do you know?

A. It was put on almost a year before Otto bought it. That was put on immediately after the well was deepened.

Q. When would that have been?

A. That would have been in the first part of 1954, probably in February. In January or February.

Q. It couldn't have been after that?

(Testimony of Elmer F. Shepard.)

A. No; it couldn't.

Q. Who put it on for you?

Mr. Burch: We will object to the question. It is assuming a fact not in evidence. There was no testimony it was put on for Mr. Shepard.

Q. (By Mr. Rehnquist): Do you know how that bonnet got there, Mr. Shepard?

A. Yes; I know how it got there. [126]

Q. How did it get there?

A. It was put on by a man that worked for me and Gordon Cameron's foreman.

Q. What was his name?

A. Ernest Woods.

Q. Did he put it on at your request?

A. He put the bonnet on at my request.

Q. You know then when he put it on, is that correct?

A. Yes.

Q. It was in February, 1954?

A. I wouldn't say February or January. I don't remember exactly when it was. Some time after the well was deepened.

Q. Was there also a flange welded in that spot?

A. I found out later they put one in.

Q. When did you find that out?

A. Oh, probably thirty days or better after it had been put in.

Q. When was it put in?

A. I was told it was put in when the bonnet was put on.

Q. That would have been in January or February, 1954?

A. January or February, 1954.

(Testimony of Elmer F. Shepard.)

Q. You didn't request that that flange be put in?

A. Not the flange. I requested the bonnet.

Q. When did you decide to sell this property, Mr. Shepard?

A. I hadn't completely decided to sell it when Otto [127] approached me to buy it. I told him I didn't know exactly whether I wanted to sell it at that time or not. I had a good crop.

Q. Did you ever list it with a real estate broker in Buckeye? A. At one time.

Q. When was that?

A. At some time prior to the time Otto bought it. I don't remember when.

Q. Could you remember as a matter of months? Was it in the summer?

A. I wouldn't make a guess. I don't know.

Q. Could it have been as much as a year before?

A. No; I don't think it was a year before.

Q. At what price did you decide to sell the land?

A. 250 a acre. 80,000.

Q. Did you ever ask less for it than that?

A. No.

Q. What real estate broker did you give it to?

A. Gus Goodman had the listing.

Q. Did you ever tell Mr. Roberts out in Buckeye it was for sale?

A. I don't remember whether I did or not. All of those real estate agents are trying to get you to list your property with them. [128]

Q. And you could have told Mr. Roberts, or Robbins? A. I could have.

(Testimony of Elmer F. Shepard.)

Q. Could you have quoted him a lower price than \$80,000? A. Absolutely not.

Q. When you first bought that land in 1952, you were pretty much of a pioneer out in the Harqua Hala Valley, isn't that right?

A. That is right.

Q. Were there many other people out in the area?

A. When I first started?

Q. Yes.

A. In that area there was only two or three other farms.

Q. Who were the operators of those farms?

A. Gordon Cameron, right west of me. Ernest Hollenstein, to the east, and Grummell, in that area.

Q. Was Raymond Benson out in that general area?

A. Yes; there is another place over there. He had the Stall place leased.

Q. Was Ed Swindle out there?

A. Not when I first started. They started after I did.

Q. When did they come in?

A. I don't know that.

Q. Did Gordon Cameron keep his property out there until after you had sold yours?

A. Did he what? [129]

Q. Did he keep his property out there until after you had sold yours? A. He still has it.

Q. Did you see quite a bit of Mr. Cameron while you were farming together out there?

A. Most every day.

(Testimony of Elmer F. Shepard.)

Q. Is he a friend of yours? A. Very good.

Q. How long have you known him?

A. Well, ever since he has been in this country, probably 7, 8, 9 years.

Q. Were you pretty good friends with Ed Swindle? A. Good friend.

Q. Were you pretty good friends with Raymond Benson?

A. A good friend. Out that far you try to be friends with everybody.

Q. Did you see these people frequently while you were first farming out there?

A. That is right.

Q. They are all still in the Buckeye area, aren't they? A. Yes.

Q. Did you bring with you in response to a subpoena your receipts for gravel put in the well?

A. Yes.

The Court: We will have our afternoon recess.

(The afternoon recess was had.) [130]

Mr. Rehnquist: Your Honor, at this time, counsel will stipulate we may interrupt the testimony of Mr. Shepard, and call Mr. Cameron.

The Court: All right.

Mr. Rehnquist: May we have these marked for identification as Plaintiff's Exhibits 12 and 13?

The Clerk: Plaintiff's Exhibits 12 and 13 for identification.

(Said reports of well driller were marked as Plaintiff's Exhibits 12 and 13, respectively.)

(Testimony of Elmer F. Shepard.)

Mr. Rehnquist: Your Honor, at this time we will offer 12 and 13 in evidence. They are certified copies of records certified in the Land Department.

Mr. Burch: We will object. No foundation laid.

The Court: What is the purpose?

Mr. Rehnquist: The purpose is to show a description of prior conditions on the property at the time the second well was drilled, their remarks on the record.

The Court: They may be received subject to the objection.

Mr. Burch: If the court please, I don't even know what is on them.

The Court: Neither do I.

Mr. Burch: Neither does the court.

The Court: I will look later.

Mr. Burch: All right, subject to the [131] objection?

The Court: Yes.

The Clerk: Plaintiff's Exhibits 12 and 13 in evidence.

(Said reports of well driller were received in evidence and marked as Plaintiff's Exhibits 12 and 13.)

GORDON CAMERON

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Mr. Cameron, will you state your full name to the Court? A. Gordon Cameron.

Q. Where do you reside? A. Buckeye.

Q. How long have you lived out there?

A. About 9 years.

Q. And where did you live before that?

A. Bakersfield, California.

Q. What is your occupation?

A. Well drilling.

Q. How long have you been in that occupation?

A. 30 years.

Q. So you have drilled wells both in Arizona and California?

A. Colorado and New Mexico; a lot more of them; yes. [132]

Q. Are you acquainted with Mr. Ernest Otto?

A. Yes.

Q. How long have you known him?

A. About two years.

Q. Are you acquainted with Mr. Elmer Shepard?

A. Yes.

Q. How long have you known him?

A. About 8 years.

Q. Do you own land in the Harqua Hala Valley?

A. Yes.

(Testimony of Gordon Cameron.)

Q. How much? A. A half section.

Q. Where is it in relation to the property Mr. Shepard sold to Cal-Nine Farms?

A. West, adjoining west.

Q. Does it adjoin it?

A. It adjoins it, west.

Q. Did you, in response to a subpoena, bring with you your records pertaining to your work on the Shepard property?

A. Yes; I did.

Q. You did drill a well for Mr. Shepard on that property?

A. Yes.

Q. When was that well drilled? Consult your records, if you want to.

A. We started drilling the 4th and the 5th of 1953. [133]

Q. 4th and 5th of what? A. April 5th.

Q. April 5th, 1953? A. Yes.

Q. And when did you finish? If you don't have it right there in the records, could you just estimate it?

A. We finished April 27th, 1953.

Q. And did you at that time file Report of Well Driller with the State Land Department in connection with the drilling of that well?

A. I don't remember what date we did file that, but we did file.

Q. Handing you Plaintiff's Exhibit 12, is this that report? On the other side you will see your signature.

A. Yes.

Q. And that is your signature on the report?

A. I think it is.

Q. And was this report prepared by you?

(Testimony of Gordon Cameron.)

A. Yes.

Q. And were these remarks placed there by you?

A. No.

Q. Do you know who did place them there?

A. No; I don't.

Q. How deep was the well you drilled for Mr. Shepard? A. 1,033 feet. [134]

Q. Do you know what the output of the well was in gallons per minute when you first pumped it after drilling? A. No.

Q. Could you estimate?

A. Pretty hard to estimate it.

Q. Do you know of your own knowledge any of the history of that well with regard to repairs, between the time it was brought in in the winter of 1953-1954, during that crop season?

A. I don't remember.

Q. Did Mr. Shepard that winter request you to go back into the well?

A. Let's see. Would that be in 1954?

Q. That would be the winter of 1953, or the early part of 1954. A. December 29, 1953.

Q. What date is that, sir?

A. December 29, 1953.

Q. Was that the date you began deepening the well? A. Yes.

Q. And Mr. Shepard had requested you to deepen it before that time?

A. Well, we just talked it over now and again.

Q. You did have a conversation with him about it? A. Yes. [135]

(Testimony of Gordon Cameron.)

Q. Did he give you any reason for why he wanted it deepened?

A. He thought maybe we could make a better well out of it.

Q. Did you quote him a price? A. Yes.

Q. What was the price?

A. I have that at home, but I don't remember. But I have it at home.

Q. When you say you thought you could make a better well out of it, had there been trouble with the well?

A. Well, it never was a good well from the day it was drilled.

Q. Was the principal purpose when you went in to deepen the well?

Mr. Burch: I think he has already stated, to make a better well of it, if the Court please. It is repetitious.

The Court: He can tell how he expected to do it.

The Witness: To make a better well out of it.

Q. (By Mr. Rehnquist): At the time you started this operation, did you plan to deepen it?

A. That is right.

Q. Did you file an application to deepen it with the [136] State Land Department?

A. That would be Elmer Shepard's, and I don't know when he filed it.

Q. Do you have the Daily Worksheets with you pertaining to that deepening operation in December, 1953? Were you personally present all the time this work was going on? A. No.

(Testimony of Gordon Cameron.)

Q. Are these records kept in the ordinary course of your business? A. Yes.

Q. And are they kept under your supervision?

A. The best I can. Sometimes the boys forget to write things down.

Q. Calling your attention to this worksheet of December 29, 1953, would you read the remarks?

Mr. Burch: Before they are in evidence?

Mr. Rehnquist: We will put them in evidence.

Mr. Burch: Let us get them in evidence, if the Court please.

Mr. Rehnquist: I didn't want to introduce the originals. Can we have these marked for identification?

The Clerk: Plaintiff's Exhibit 14 for identification.

(Said log records were marked as Plaintiff's Exhibit 14 for identification.) [137]

Q. (By Mr. Rehnquist): Do these appear to be photostats of your log records? A. Yes.

Mr. Rehnquist: Do you want to look at these?

Mr. Burch: Let me just check them.

May I ask one question on voir dire, then?

The Court: All right.

Q. (By Mr. Burch): Mr. Cameron, you stated that these records are kept the best you can, and there are things sometimes the boys don't put on there, is that correct? A. Oh, yes.

Q. How about yourself? Do you occasionally fail to keep a complete record, too?

(Testimony of Gordon Cameron.)

A. That is right. If I catch them I try to keep them right.

Mr. Burch: We have no objection to these.

Mr. Rehnquist: We will offer them in evidence.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Said log records were received in evidence and marked as Plaintiff's Exhibit 14.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit Number 14, the first sheet, dated 12-29-53, Mr. Cameron. Would you read the remarks there?

A. "Started in hole, bit hit something at app. 477 feet." [138]

Q. Were you present when the bit hit something?

A. No.

Q. Were you called in shortly afterwards?

A. Yes.

Q. And calling your attention to the second sheet, 12-30-53, of Plaintiff's Exhibit Number 14, would you read the remarks in the left-hand corner, left-hand column, rather?

A. Came out of hole with 15-inch bit, wouldn't go. Went back with 12 $\frac{1}{4}$. Wouldn't go past 458. Came out and went back with drill collar. Drill collar took weight once at 458.

Q. Am I correct in this statement, then, that a 15-inch bit failed to go beyond the 400-foot area of the well? A. Went to 477.

Q. And wouldn't go further, is that correct?

A. That is right.

(Testimony of Gordon Cameron.)

Q. And then a 12¼-inch bit was inserted, and that would not go past 458 feet?

A. That is right.

Q. And then a 10-inch drill collar was inserted, and it took weight at 458 feet?

A. That is right.

Q. What does the expression "take weight" mean, Mr. Cameron?

A. Well, you can set it on something, put it [139] down.

Q. So in effect the 10-inch drill collar wouldn't go beyond 458?

A. It did, but it touched that.

Mr. Rehnquist: Would you read that answer?

(Answer read.)

The Witness: It took a little weight there and went on.

Q. (By Mr. Rehnquist): Then would you read the remarks in the second column of Plaintiff's Exhibit 14, the sheet dated 12-30-53?

A. Well——

Q. That may not be necessary. Would you read the remarks in the third column?

A. I can read them.

Q. Okay. Will you read the remarks?

A. 16 feet of the 4th single—that is the 4th joint, rather, of 4½ in hole is bad place in hole.

Q. Then would you read the remarks in the third column?

A. "Came out of hole. Went in with impression

(Testimony of Gordon Cameron.)

block. Came out of hole and went back in with 12 $\frac{1}{4}$ bit. Drilled through bad place and went on to bottom."

Q. So it was necessary to drill through this area at 477 feet? A. Yes.

Q. Did you have any opinion as to what caused this obstruction, Mr. Cameron? [140]

A. No; I don't.

Q. Do you have any opinion as to what was drilled through when you finally drilled through with a 12 $\frac{1}{4}$ -inch bit?

A. No; we never had any more trouble with it.

Q. Do you have any opinion what you drilled through at the time you drilled through with the 12 $\frac{1}{4}$ -inch bit?

A. No; I don't know. We ran an impression block, and it never shows any marks on it.

Q. Is it possible to say what size bit or collar would have gone through there without drilling?

A. Well, the 12 $\frac{1}{4}$ went.

Q. That was with drilling, wasn't it?

A. Very little. It took a little weight. Of course, the 10-inch drill collar did the same thing.

Q. It took weight?

A. Yes, and if you recall, we had a 15-inch bit in to 477, and when we came back out, our 12 $\frac{1}{4}$ took weight, also the drill collar at 458, I believe it was.

Q. And what is your interpretation of those facts?

A. Those are kind of mysteries. You can't realize what is taking place.

(Testimony of Gordon Cameron.)

Q. Was Mr. Shepard present during part of this work? A. Yes.

Q. Did you inform Mr. Shepard of this trouble at 477 feet?

A. We talked about it; we talked about the well as we [141] drilled all the way through.

Q. So he was constantly acquainted with your progress?

A. Yes. Maybe he wouldn't be out there for a day or two, but he was always out there.

Q. Did he ever give you any instructions as to what to do?

A. He said he didn't know what to do.

Q. Did he ever request you to line the casing at this trouble spot? A. No.

Q. Did you put a liner in there?

A. After we run the impression block, we didn't think it was all right; we didn't think it was any place in the well to bother with.

Q. How much did you deepen the well at this time, Mr. Cameron?

A. We drilled the well from 1,033 to 1,373 total depth.

Q. Did you case the extra depth? A. No.

Q. Was this extra depth what they call a wet hole? A. Pardon?

Q. Was this extra depth a wet hole? Did it fill with water down there?

A. You mean, was there water in the hole?

Q. Yes. A. Yes. [142]

Q. Below 1,033? A. Oh, yes.

(Testimony of Gordon Cameron.)

Q. Did you have a conversation with Mr. Otto about the well after he had bought the property, and shortly before you went to Canada last summer?

A. Yes.

Q. Were you called out to the property by Mr. Otto, or requested to come out?

A. I don't remember.

Q. Did you have a conversation at the pump site on Mr. Otto's property?

A. Maybe I did. I was out there.

Q. Did he ask your advice about the well at that time?

A. When we talked about drilling a new one?

Q. I mean before you went to Canada last summer.

A. Yes; he did. I remember now we talked about that.

Q. What advice did you give him?

A. I told him I wouldn't stop that well any more than I had to; I would keep that steady running.

Q. Did you regard that as the best remedy under the situation?

A. Under that sand and silt condition, yes.

Q. And did you and Mr. Otto have a conversation with respect to the well last fall at his house?

A. Yes; of drilling a new well. [143]

Q. Was the conversation about drilling a new well? A. Yes.

Q. Who was present at that conversation?

A. Well, I don't remember, but I believe my wife,

(Testimony of Gordon Cameron.)

and his wife, and he and I. I believe that is right. I am not sure.

Q. And did you at that time advise him as to whether or not he should attempt to repair that well?

A. I think I advised him against repairing it.

Q. Why did you advise him against repairing it?

A. The way I figured, that he was pumping so much sand and silt, that you would have to pull that pump once every year, or twice, which cost you \$2,000 a round trip.

Q. And it wouldn't have been economically feasible to keep on operating that well?

A. That is the way I thought.

Q. Did you make any further statement at that time as to what was wrong with the well, other than the sand and the silt?

A. I don't remember of it.

Q. You don't remember whether you did or not?

A. I don't remember.

Q. Did you in fact drill a new well for Mr. Otto and for Cal-Nine? A. Yes. [144]

Q. How deep is this new well?

A. 1,500 feet.

Q. And what casing diameter have you used in the new well? A. In distance?

Q. And depths, please.

A. I haven't got that with me, but it is approximately 525 or 30 feet of 20-inch, and the balance 16, 16-inch O.D.

Q. That is in the new well?

(Testimony of Gordon Cameron.)

A. No. Wait a minute. Pardon me. 12-inch. 12-inch.

Q. 530 feet of 20-inch O.D.? A. Right.

Q. And then the rest is 12-inch O.D.?

A. That is right.

Q. How does that compare with the earlier well on that property that you drilled for Mr. Shepard?

A. There is no comparison.

Q. I mean as to the O.D. and length of the casing.

A. The other one had 20-inch at 460, and the balance was 16.

Q. And is the depth you drilled this new well to, in your opinion, necessary for a good well on this property? A. That has been proven; yes.

Q. You didn't drill it any deeper than you felt you had to? [145] A. No.

Q. And was the manner in which you cased and perforated the well all necessary to get a good well on this property?

A. I didn't get the first part.

Q. Were the manner in which you cased and perforated this new well all necessary to get a good well on this property?

A. That is the way we do it, and we got a good well, so we sure think that.

Q. You didn't do any more than was necessary to get a good well? A. Not to my knowledge.

Q. Do you remember approximately what you charged for your services?

The Court: The bill is in evidence.

Mr. Rehnquist: Okay.

(Testimony of Gordon Cameron.)

Q. (By Mr. Rehnquist): When was your own well drilled, Mr. Cameron?

A. Well, let's see. Four years ago, I believe.

Q. And did you pack it with gravel at the time you drilled it? A. Yes.

Q. Did you add gravel on subsequent occasions?

A. Yes.

Q. About how often did you add gravel to that well?

A. I would have to look back on my gravel receipts. I [146] don't remember. It was various times.

Q. Would it have been once a month?

A. Well, we would add some gravel to it, and maybe it would go three or four months. We kept the pile up on top of the ground there, and a hole down underneath, so it would take it as it could, and we just kept that pile there.

Q. How often would you replace gravel on the pile?

A. We put 440 tons. I don't know how often we added to it. There was 440 tons of gravel in the well.

Q. Did you ever advise Mr. Shepard when he owned this well that he ought to drill a new well?

A. No.

Q. Did you ever tell him you thought he had a bad well?

A. I didn't have to tell him. We all knew it was pumping that silt and sand. We talked several times about if we ever did drill a new one, how we would do it.

Mr. Rehnquist: No other questions.

(Testimony of Gordon Cameron.)

Cross-Examination

By Mr. Burch:

Q. When you refer to it as a bad well, you refer to a silt and sand condition, is that right?

A. Yes.

Q. And it did pump plenty of water to irrigate Mr. Shepard's land?

A. Yes; he irrigated. I believe he had the whole place [147] in that first year it was planted.

Q. That would be 300 and some odd acres?

A. I believe it was 300, between them.

Q. Your well and his well were about the same, as far as the condition of the water, is that correct?

A. I believe that is about right.

Q. Was yours about the same depth, also?

A. No; mine is 930. It is cased to 930, and the bottom is 944.

Q. You say, I think, you put in 440 tons of gravel altogether in your well, and it stopped taking it after that?

A. It took a little bit the other day.

Q. As I understand it, you dug under one time to make room for gravel, is that right?

A. That is right.

Q. Do you know whether or not any gravel was put in Mr. Shepard's well?

A. Yes; there was gravel put in it.

Q. Who put it in?

A. We put a lot of it in.

Q. Do you have any idea how many tons you put in?

(Testimony of Gordon Cameron.)

A. I don't know. We could get the figures.

Q. Was it a matter of 150, 200 tons?

A. I can't remember just what we did put in there.

Q. You put in all it would take? [148]

A. We filled it up, yes, when we drilled it.

Q. Did you ever furnish him gravel after that on occasion?

A. No; I don't have anything to do with gravel.

Q. Did you ever tell Mr. Otto that Mr. Shepard's well had collapsed? A. No.

Q. Did you ever tell him that it was broken?

A. No.

Q. Did you ever tell him that was the reason it wouldn't produce any water? A. No.

Mr. Burch: I would like the reporter to find the statements of Mr. Otto in regard to what Mr. Cameron told him.

The Court: She can do that tonight.

Mr. Burch: I would like to have it while I have this witness on the stand.

The Court: We aren't going to fool with that now.

Mr. Burch: May the record show I have requested the reporter to find the statements of Mr. Otto which he made on the stand with regard to what Mr. Cameron told him with regard to the well, and that the Court has advised me not to go any further with it?

The Court: At this time. [149]

Q. (By Mr. Burch): You never, then, told Mr. Otto at any time that that well was broken or collapsed, is that correct?

(Testimony of Gordon Cameron.)

A. Not that I remember.

Q. Did you ever know such a thing had occurred?

A. No.

Q. Did you ever notice any decrease in the output of that well from what it was originally?

A. Yes; I noticed that.

Q. And when did you notice that?

A. At various times that I would be out there. I don't know what date it was, or anything.

Q. Did you notice it when Mr. Otto had the property?

A. Yes; I seen the well when Mr. Otto had the property.

Q. Did you ever recommend to him that he pull the bowls? A. Not that I remember of.

Q. Did there seem to be any difference in the capacity of the well after you had deepened it, and the capacity before?

A. Yes; it was a little better.

Q. It was a little better?

A. But not as good as we expected.

Q. You had expected, I take it, that it would be increased considerably in capacity by that additional depth? A. I beg your pardon?

Q. You had expected that its capacity would be considerably increased? [150]

A. I might explain, if the deepening job would go off like we had hopes it would. We had a lot of trouble trying to get circulation. We wanted to go to 1,500, but we couldn't do it.

Q. That was because there was too much water

(Testimony of Gordon Cameron.)

down at the bottom?

A. No; we never could get circulation back.

Q. You put mud down at the bottom?

A. Yes.

Q. And that kept washing away, is that correct?

A. Yes.

Q. When Mr. Rehnquist asked you if there was water in the hole, there was water for a considerable distance above 1,000 feet, is that correct?

A. Yes.

Q. Where was the water level?

A. I think it was right close to 200 feet.

Q. You stated you put an impression block in when you found there was some difficulty in the shaft. What is that impression block?

A. An impression block is similar to a blade. We pour lead facing on it, and when you go down in a well, if you set down on something that is sticking up in the well, like maybe a casing may be out, when you set down you get an imprint on that lead, and pull it out of the hole and look at the bottom [151] of it.

Q. It would show on the bottom of this impression block if the pipe had collapsed, or if there was a major obstacle?

A. That is the purpose of it.

Q. And you stated there was no such showing?

A. There was not a mark on it. We have it laying in our yard at home now.

Q. Was it your impression this bad spot was a serious obstruction in the shaft of this well?

A. When we first hit it, we thought it was. When

(Testimony of Gordon Cameron.)

we couldn't get an impression that would show the pipe was in two, or anything, we just disregarded it and went on.

Q. Is that a common occurrence, that there be some narrowing of a pipe at one place or another?

A. Yes; that is very possible.

Q. If it was just a matter of an indentation in the pipe for an inch or two, you would get the same result?

A. That is right.

Q. What this was you don't know?

A. I don't know.

Q. You stated you didn't pay much attention to it?

A. I was quite concerned with it until I talked with Mr. Shepard, and he said 12 and a quarter was all right. He would be satisfied if he could get a 12 $\frac{1}{4}$ hole down to 1,500 feet. [152]

Q. With regard to your own well, Mr. Cameron, what kind of production does it have?

A. Oh, I think around 15, 1,800 gallons.

Q. Does it have any silt in it?

A. Very bad.

Q. Do you have to replace your bowls occasionally?

A. I think I have the third set in there.

Q. Did you ever discuss this matter with Mr. Otto prior to his purchase of the Shepard property?

A. Well, there was discussions there, but I don't remember whether it was before or after, or when it was. I don't remember when.

(Testimony of Gordon Cameron.)

Q. He had made a number of inquiries of you about the Shepard property prior to its sale?

A. I wouldn't say he made a number of inquiries.

Q. He made some?

A. I think he talked a little about it.

Q. That was over at your place?

A. I don't remember. It might have been on the road some place. I don't know.

Q. Did you have a chance to observe the crop Mr. Shepard raised in 1954? A. Yes.

Q. How did it compare with your own?

A. I think he had a pretty good crop. [153]

Q. He had about how many acres in it at that time? A. It was 1954?

Q. That was the year before.

A. Was that allotted then? Was cotton allotted then?

Q. Yes.

A. I think he had around—I don't know, I think he had around 100 acres, although it may be a little more.

Q. Could he have had about 205 acres?

A. I don't remember that.

Q. Did he irrigate it, whatever he had?

A. What?

Q. Did he irrigate all he had at that time with his own well?

A. No; I think he got some water from us that year.

Q. That particular time he got water from you for about ten days, didn't he?

(Testimony of Gordon Cameron.)

A. I don't remember how long it was.

Q. You let him have the water? A. Oh, yes.

Q. And then, other than for that short period, whatever it was, he used his own well, is that correct?

A. That is right; as far as I know, as I remember.

Q. And your observation was he had a good crop, whatever the acreage?

A. Yes; I think Elmer had a pretty good [154] crop.

Q. Did you do any work on his well in 1954?

A. This all shows 1953.

Q. There was no necessity, apparently, for you to do any work in 1954, is that correct?

A. The deepening job was done in 1953. That is the last we worked on it.

Q. That was the last personal knowledge of Mr. Shepard's well that you had, is that it?

A. That is right.

Q. And at the close of that deepening job, you observed its pumping capacity, and I think you stated it was slightly increased over what it had been?

A. We finished the deepening job in 1954.

Q. That was in 1954?

A. January 13, 1954.

Q. Did Mr. Otto ever talk with you about a hood and flange that were put on the discharge pipe of that particular well?

A. Yes, I believe that there was something said about it.

(Testimony of Gordon Cameron.)

Q. Can you recall what his conversation with you was?

A. I think he asked me what the hood was on there for. I don't remember the conversation too good.

Q. Do you recall what you told him it was on there for?

A. Yes, I gave him some kind of smart remark.

Q. Did you know what the hood was on there for? [155]

A. No, I don't know what it was on there for.

Q. Had you ever observed it?

A. Yes. You see them on a lot of wells.

Q. Pardon?

A. You see them on a lot of wells.

Q. What is the usual purpose of them, Mr. Cameron?

A. I think most of them was just because people want them, so far as I know. Maybe they got a small place to put their water, and they want to turn it down, or something. They are put on for various reasons.

Q. Did you have a man working for you named Woods? A. That is right.

Q. Do you know whether he was the one that put that on the discharge pipe?

A. Well, now, he did some work over there, but what part of it he did, I wasn't there.

Q. Did you ever make any observation of your own as to the number of siphon pipes that were

(Testimony of Gordon Cameron.)

used on the Shepard property during the time Mr. Shepard had it?

A. Compared with mine, is that the question?

Q. No, just what he was using.

A. Yes, I expect I did, but I don't remember off-hand what it was.

Q. Does your man Woods do some work for Mr. Shepard on occasion, too? [156] A. Yes.

Q. Were you out there during the time of the rains last year, Mr. Cameron?

A. I was out at the very end of them. I was in Canada all the time those rains were going on. When I came back, the rains were just over.

Q. You have seen the flood conditions out there, then, I take it? A. Yes, I saw that.

Q. They are usually quite severe?

A. That is right.

Q. Have you made any preparations on your own property to turn floodwater?

A. Oh, yes.

Q. What have you done?

A. We just put up a dirt bank along the west side of our place. Then we had a high place, and we cut the high place out so the water would not drain out.

Q. The Shepard place is right in line with natural drainage from the mountains?

A. He is right in line with my place.

Q. You are both in line with natural drainage?

A. Yes.

(Testimony of Gordon Cameron.)

Q. Did you observe any damage done to the crop that summer of 1955? [157]

A. No, because I didn't pay too much attention to his. I wanted to take care of my own.

Q. It had done some damage to your property, even though you had it diked?

A. Yes. You see, it was not diked so good last year.

Q. What was the result on your own property last year?

A. It washed our ditches out from it. We couldn't have any water on our cotton. [157-A]

Q. Did that have any effect on your cotton?

A. Yes.

Q. What did it do to it?

A. We couldn't get as much cotton.

Q. Do you have any idea how much it was decreased?

A. I think ours was decreased a half a bale, probably. That is just my opinion.

Q. Did you make any observation of the well on the Shepard-Otto property during 1955? Did you ever go over and look at it, particularly?

A. Yes, I was over there.

Q. Did you notice any decrease in its output?

A. Yes.

Q. Would that have been consistent with the bowls wearing out?

A. Yes, I should think so.

Q. What happens when you pump a lot of silty and sandy water?

(Testimony of Gordon Cameron.)

A. It just cuts your impellers and your pump, cuts your bowls, just won't pump as much water, and the more the wear, the less water they will pump.

Q. What did you have to do to repair that situation?

A. Well, I called a pump company out, and they put on a new set of bowls.

Q. Does that restore it to its original [158] capacity? A. Yes, it has.

Q. It was testified to here that you told him to drill a new well, because the old well had collapsed——

A. To get away from that sand and silt. That is the worst thing we have got there, pumping your sand and silt. It fills your ditches up.

Q. You didn't tell him to drill a new well because the old well had collapsed, but because of this silt condition? A. No.

Q. As far as you know, that well could still produce as much water as it ever did, is that right?

A. It could have been cleaned out. It has got some sand in it.

Q. It would have had to have new bowls and impeller blades?

A. Yes, new set of bowls.

Q. But it was capable of producing?

A. Of course, we don't know. It wasn't ever done that way, but we don't know. We think it would.

Q. There was no reason to think differently?

(Testimony of Gordon Cameron.)

A. It sanded up. We know that today.

Q. You don't know what, or you don't know when that sanding process started, do you?

A. No, I don't know that.

Q. Did you observe the old well, the original one, Elmer [159] Shepard put in 120 feet away from the second well he put in?

A. I was out there a time or two when he was drilling it, and I was out there with Elmer a couple of times.

Q. Did you observe at any time since the floods of last July where floodwater got into that old well?

A. Into the old well?

Q. Yes.

A. The floods were pretty well over when I came back, and, as I said, I was busy and I don't know.

Q. If floodwater had gotten down into the old well, would it have increased the silt condition down where the pump and bowls were?

Mr. Rehnquist: Object. That is extremely speculative. There is no evidence the water ever got in.

The Court: The witness doesn't know anything about that.

Q. (By Mr. Burch): Would floods in that general area of yours, in your experience, cause an exceptionally silty condition in the wells?

A. If it got into it they would. To the best of my knowledge, it would.

Q. I think you stated you told Mr. Otto to run that pump continuously. That is true, isn't it?

A. Yes.

(Testimony of Gordon Cameron.)

Q. Isn't it true that would have an effect of wearing out the bowls faster? [160]

A. That is right. As long as it is pumping clean water, it wouldn't wear the bowls, like that sand and silt does.

Q. Do you know if it pumped sand and silt any worse at one particular time in 1955 than at another?

A. Well, I believe when that sand was moving around, I believe it would pump more sand at one time than you would another. If you can keep the pumps running and keep them steady, they didn't pump as much sand and silt as when they were started and stopped.

Q. I understand in your own well when it is started up, it will take two or three days before the silt condition will clear up?

A. If you aren't careful, it will take longer than that.

Q. I understand Mr. Shepard's well will clear up faster than yours. Did you ever make that observation?

A. I'm not sure about that question.

Q. It would clear up, though, if you started it and were careful?

A. Yes.

Q. Apparently when Mr. Otto was operating it, it became a permanent condition, is that correct, the silt?

A. No, I think I have seen lots of clear water come out of that well when Mr. Otto had it.

Q. It did pump clear water after it got rid of the

(Testimony of Gordon Cameron.)

silt condition? [161] A. That is right.

Q. That is true?

A. If you don't agitate it, keep away from agitating it as much as possible.

Q. In Mr. Otto's new well, you ran 530 feet of 20-inch casing, is that right?

A. Approximately. Pretty close.

Q. And that was a considerably more expensive type of casing than Mr. Shepard used, is that correct?

A. We pulled 361 feet of pipe out of the old well and put it in the new one.

Q. That was the 16-inch casing? A. Yes.

Q. The 530 feet of 20-inch casing——

A. That was the 20-inch I am talking about.

Q. And the difference between that and 530 you purchased? A. Yes.

Q. You also didn't perforate the same way on this well, did you? A. Oh, no. No.

Q. And you perforated at a different depth?

A. That is right.

Q. That was to get away from the silt condition out there? A. That is right. [162]

Q. Was that more expensive to have him perforate farther down?

A. No. It was less expensive.

Q. Was it more expensive to drill to 1,500?

A. Yes, that would be more expensive.

Q. The deeper you go, the more it costs?

A. That is right.

Q. Did you put gravel in the new well?

(Testimony of Gordon Cameron.)

A. Yes.

Q. How much did that take?

A. 330 or 40 or 50 tons. I don't remember. We have the figures.

Q. Did you check it since then to see if it needs any more?

A. Yes. I think Mr. Otto is checking that.

Q. You don't know whether it needs any more?

A. No, I don't.

Q. Did Mr. Otto ever ask you if he could use some of your water in case he runs short?

A. I don't remember if he asked me and I made the offer. We talked about it, sir.

Q. Did you tell him how he could use your water? A. Yes.

Q. How was that?

A. I told him to come out of the end of our ditch, and [163] come out on that property right beside us with a ditch, and it would reach his place.

Q. And that was how you had done it before?

A. Yes.

Q. And did you advise him of that?

A. I told him about it.

Q. You told him he could have the water if he needed it, is that correct?

A. When we wasn't using it.

Q. He never attempted to take any of your water, apparently? A. What?

Q. He never used your water? A. No.

Q. At the time Mr. Otto purchased the property.

(Testimony of Gordon Cameron.)

your well and Elmer's well were the only two within that immediate vicinity? The next well was several miles away, is that correct?

A. I didn't get that question.

Q. You had a well on your property?

A. Yes.

Q. Elmer's was right next door to you, so to speak?

A. Yes.

Q. Then there were no other wells or cultivated property for a distance of several miles, isn't that true? [164]

A. Jimmy Harrison came in there shortly after that, but I don't recall just when that was.

Q. How far is he from your property?

A. He is a mile and a half away.

Q. He is the closest to you, is that correct?

A. A mile and a half, yes, that is right.

Q. Then there is another about three and a half miles away, isn't there?

A. That is right.

Q. And yours and Elmer's were practically identical?

A. In my opinion, they were about the same.

Q. And you are still using yours?

A. Yes. I don't like it, though.

Q. How much do you irrigate with it?

A. I got 111 acres of cotton I am irrigating.

Q. Do you have any other land under cultivation?

A. Yes, we have some, but we are using it for pasture.

(Testimony of Gordon Cameron.)

Q. What is the most you have irrigated with it?

A. I irrigated the whole place with it. I grew a bale and a half of cotton when I did.

Q. You grew a bale and a half of cotton on how many acres? A. On three hundred.

Q. That was your sole source of supply?

A. Yes. I didn't have enough water for it. [165]

Q. If you had more water, you could have had more cotton with it? A. That is right.

Q. I think you told the court you put in three sets of bowls during that time?

A. I have got the third set now.

Q. That is the kind of operation you told Mr. Otto he shouldn't get into, isn't that right?

A. That is right.

Q. Did he ever ask you about your experience with bowls prior to the purchase of the place, or do you remember? A. I don't remember.

Q. Do you know what Mr. Otto paid for the property?

A. I have heard, but I never saw the figures.

Q. If I told you it was 80,000 dollars, is that the figure you have heard? A. That is right.

Q. Knowing what you know about the well at the time Mr. Otto purchased it, would you say that was a fair price——

Mr. Rehnquist: We object to that. Under the Arizona Rule for Damages in Fraud, the estimate of the value of what you are receiving is utterly irrelevant.

The Court: Yes, I think so. I agree.

(Testimony of Gordon Cameron.)

Q. (By Mr. Burch): You were one of the pioneers in developing that country [166] out there, were you not?

A. Yes, we were one of the first.

Q. You are aware of land values there?

A. Pardon?

Q. You were aware of the land values out there?

A. Yes.

Q. Can you give us your opinion of the value of the property when Mr. Otto purchased it, in the condition it was?

Mr. Rehnquist: Object again on the same grounds.

The Court: Same ruling.

Mr. Burch: If the Court please, I do believe the measure of damages is the difference between the actual value of the property received and the representations of the property value.

The Court: All right, the Court ruled.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. Mr. Cameron, was the plan for getting water from your place to Mr. Otto's, what you described to Mr. Otto, did that involve taking water through a ditch outside of either of your properties?

A. Yes.

Q. Was there a ditch there?

A. Yes, there had been a ditch there. Whether we filled [167] it up or not, I don't know. I don't remember that.

(Testimony of Gordon Cameron.)

Q. Was that the way Elmer Shepard had gotten his water the previous year?

A. That is right.

Q. He had taken it outside the property?

A. That is right.

Q. How much more in terms of drilling does it cost to drill a 1,500 foot well than a 1,350 foot well?

A. Whatever your price is for the additional figure.

Q. What is your price?

A. Depending on the area.

Q. What would be the price you would have charged Mr. Otto for going from 1,350 to 1,500 in his new well?

A. Eight dollars, I believe it was.

Q. Is that per foot?

A. Eight dollars per foot.

Q. Did you notice a decrease in the Shepard well at the time Mr. Shepard was the owner of the property, at various times?

A. I can't remember. It might have decreased a little.

Q. At various times?

A. Yes, at various times when his bowls would get worn.

Q. Is it common, in your experience as a well driller, to find a situation when you are going in to deepen a well where a 15-inch bit will not go, a 12½ inch bit won't go, [168] and a drill collar that is 10 inches takes weight at a particular spot?

A. Well, we have run into that trouble before.

(Testimony of Gordon Cameron.)

Q. Am I right in thinking this, Mr. Cameron, that if that is the inner diameter of the casing, which would be 15 and a half inches in this case, that a 12 and a half inch bit would perhaps fit in about like that? (Indicating on diagram.) A. Yes.

Q. And a 10-inch drill collar about like that?

A. Yes.

Q. So that when a 10-inch drill collar takes weight at 450 feet, it means there is something sticking out that far from one side or the other into the well opening?

A. It could be a bridge.

Q. What is a bridge?

A. A sand bridge that will accumulate in a hole when you drill, which is frequent.

Q. Do you know of your own knowledge what happened to the very first well drilled on the Shepard property? A. I don't know.

The Court: We will suspend until ten in the morning.

(Thereupon, an adjournment was taken to the following day, Friday, May 18, 1956, at ten o'clock a.m.) [169]

Friday, May 18, 1956—10:00 A.M.

Redirect Examination

(Continued)

By Mr. Rehnquist:

Q. You are the same Gordon Cameron who has previously testified in this action? A. Yes.

(Testimony of Gordon Cameron.)

Q. How many bales to the acre did you make off your own crop last year, Mr. Cameron?

A. I think we made 218 bales off 95 acres.

Q. And it is your testimony if it hadn't been for the rain, you would have done half a bale an acre better? [170]

A. Well, that is what we think.

Q. When you deepened Mr. Shepard's well in December, 1953, was the formation material you went through in the deepening about the same as at the thousand foot level?

A. I believe it was a little coarser, coarser sand.

Mr. Burch: I beg your pardon?

The Witness: I believe it was a little coarser sand.

Q. (By Mr. Rehnquist): But it was generally sandy? A. Yes, it was sand.

Q. (Indicating on diagram): Is that a rough approximation of the way your land lies with respect to the Shepard property, those being the respective wells? A. Yes.

Q. Now, during the 1954 season when Mr. Shepard was still farming the property, was this area of yours down here in cotton, this southwesterly portion? A. 1954?

Q. Or did you later level that?

A. No, it was all leveled at the same time.

Q. And would that have been in cotton, this little corner down here?

A. One year it was, but I don't remember

(Testimony of Gordon Cameron.)

whether it was 1953 or 1954. 1953 it was, 1954 it was not.

Q. It was not? [171]

A. I don't believe it was.

Q. And when Mr. Shepard borrowed water from you that year, would they have taken water along the edge of the crop that way?

A. No, we didn't have any crop in there.

Q. I mean the crop in here. What I am trying to get at, would they have to go——

A. No, we had a little hill there.

Q. This past year you had leveled this land, and it was in cotton? A. Yes.

Q. So Mr. Otto, if he wanted to borrow the water, would have had to come all the way around here? A. That is right.

Q. (Indicating on diagram): All the way around here? A. That is right.

Mr. Rehnquist: We have no further questions.

Recross-Examination

By Mr. Burch:

Q. Mr. Cameron, I think you stated yesterday on direct examination that the obstruction you found when you started deepening the Shepard well might have been a sand bridge. Do you recall that statement? A. That is right.

Q. What is a sand bridge? [172]

A. It is sand that accumulates in the well in different spots. It may be 20 feet thick, then 100 feet of water in another one. It can be any way.

(Testimony of Gordon Cameron.)

Q. How did you get rid of it?

A. You bale them out or drill them out.

Q. Are they serious obstructions?

A. No, they are not serious.

Q. Have you ever had any in your own well?

A. No.

Q. Have you ever had sand in your pipes in your well? A. Yes.

Q. What happens to it, ordinarily?

A. Well, it seems we have a strong flow of water at the bottom, and it will clean itself out if there is any sand left in it.

Q. Is that the same flow of water, apparently, the Shepard Well drew on? Was it?

A. Well, we think so.

Q. There was a strong flow of water available, then, to both the wells? A. Yes.

Q. When you pulled the casing from the Shepard well, was it necessary to use a hydraulic jack?

A. We used 200-ton hydraulic jacks.

Q. And what was the net effect? Were you able to pull [173] the casing out easily?

A. No. I think it took two or three days to get a footing under those jacks that would hold.

Q. Was the casing apparently packed in tight, then? A. Yes. Yes.

Q. Incidentally, in regard to your cotton crop, how long have you farmed that land of yours?

A. I think this is four years.

Q. And has the crop progressively gotten better each year? A. Yes.

(Testimony of Gordon Cameron.)

Q. That is the normal progress when you open up new land, isn't it? A. I think so.

Q. And the first year it is probably its worst crop of all, and your second year is better, just a little better, is that right? A. That is right.

Q. So last year there would have been the best crop you ever had off the land, is that right?

A. That is right.

Q. I think the Shepard property wasn't farmed as soon as yours, is that correct?

A. I think it was one year later.

Q. One year later? [174] A. Yes.

Mr. Burch: I wonder if the reporter would read to Mr. Cameron at this time a statement of Mr. Otto that I requested yesterday to be read to him.

(A portion of Ernest Otto's testimony on direct examination was read to the witness, as follows:)

“Q. (By Mr. Rehnquist): Had you spoken to Mr. Cameron before this conversation about the possibility of repairing the well? A. Yes.

“Q. What did Mr. Cameron tell you at that time?

“Mr. Burch: We make the same objections, hear-say.

“The Court: All right, go ahead.

“The Witness: Well, he come to the house that morning, and he said that he just decided he might as well lay the cards on the table and make it plain to me that I shouldn't try to repair that well.

(Testimony of Gordon Cameron.)

“He says, ‘I don’t care if I get the job or someone else gets it, but,’ he says, ‘I don’t want you to spend five, six, seven thousand dollars working on that well, because,’ he says, ‘It is impossible to repair.’

“And I asked him what made him think so. And he kind of laughed, and he said, ‘Well, I’m not thinking,’ he says, ‘I know.’ [175]

“I said, ‘How do you know?’

“He said, ‘I was in that hole last year, and,’ he said, ‘that casing was broke or collapsed at that time when we went into the hole,’ and he said, ‘we put our drill into it and at 477 feet it stopped. So they pulled the bit out and put on smaller sizes,’ and he said, ‘they finally got, I believe it was, an 11 or 12-inch bit.’

“He said, ‘They stayed there a couple of hours and drilled through the bad place. Then they went on down and deepened the well for Elmer. But,’ he said, ‘it was impossible to repair the well.’ ”

Q. (By Mr. Burch): Do you recall any such conversation, Mr. Cameron?

A. I never told anybody the casing was broke in two——

Q. Did you ever tell Mr. Otto it was impossible to repair the well?

A. I never told him it was impossible to repair the well.

Q. Did you ever tell him the well was collapsed? A. No.

Mr. Burch: That is all.

(Testimony of Gordon Cameron.)

Redirect Examination

By Mr. Rehnquist:

Q. Did you ever tell Mr. Otto it was not feasible, or not advisable to repair the well? [176]

A. I did.

Mr. Rehnquist: That is all.

Recross-Examination

By Mr. Burch:

Q. And in that respect, it was due to economic conditions, and not the condition of the well?

A. Well, the condition of the well, the sand and silt. I didn't think it was feasible.

Q. I think you stated that is the condition your own well is in that you were operating?

A. Yes.

Q. It was possible to repair the well?

A. You couldn't have took and put new perforations in.

Q. You could have put new bowls in?

A. Yes

Q. And you would have had an available water supply the same as always?

A. Yes, you would have.

Mr. Burch: That is all.

(Testimony of Gordon Cameron.)

Redirect Examination

By Mr. Rehnquist:

Q. And the bowls would have been constantly being worn down by the sand coming into the perforations, is that correct? A. Yes.

Mr. Rehnquist: That is all.

Mr. Burch: That is all. [177]

Mr. Rehnquist: Your Honor, may Mr. Cameron be excused?

The Court: He may be.

Mr. Burch: Mr. Cameron has asked if he may remain in the courtroom. We have no objection.

Mr. Rehnquist: We certainly have no objection.

The Court: All right.

(Witness excused.)

KENNETH G. BROWN

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Ragan:

Q. Will you state your name please?

A. Kenneth G. Brown.

Q. What is your address?

A. 5322 Culver, Phoenix.

Q. How long have you lived in Arizona?

A. A little over 8 years.

Q. What is your occupation now?

(Testimony of Kenneth G. Brown.)

A. I am superintendent for Roscoe Moss Company.

Q. In Arizona? A. Yes.

Q. What is the Roscoe Moss Company?

A. We are water well contractors.

Q. Does that mean you drill water wells? [178]

A. Yes, sir.

Q. Does your duty include any other type besides water well drilling?

A. No, just water wells.

Q. Have you been in that position since you have been in Arizona for the last 8 years?

A. Yes, sir.

Q. What is your general education, Mr. Brown?

A. I have a Bachelor of Science in Mechanical Engineering from the California Institute of Technology.

Q. When did you receive that? A. 1944.

Q. What was your work career after that date?

A. I was in the Navy until 1946, and I left the the Navy and joined Roscoe Moss Company in Los Angeles, and worked there for about a year and a half until I was sent over here in February, 1948.

Q. While you were over there, in what capacity were you employed?

A. I was in an engineering office of the company.

Q. Since you have been here for 8 years as superintendent of the Arizona operations of the well company, what has your job consisted of, its duties?

A. Well, the direction of the operations of our

(Testimony of Kenneth G. Brown.)

drilling equipment, and the contact with customers, setting up of contracts, [179] the general overseeing of the entire operation here.

Q. Do you supervise the drilling of the wells themselves? A. Yes, sir.

Q. In this connection, are you familiar with the operation of pumps, pumping wells?

A. In a general way. We don't handle pumps directly.

Q. Not directly? A. No, sir.

Q. Are you familiar with the Report of Well Driller and Log of Well required to be filed by the State for wells drilled in this state?

A. Yes, sir.

Q. I would like to show you Plaintiff's Exhibit 13, which describes a well drilled on the Section 21, Township One North, Range 9 West, in Maricopa County, a well completed on 10/6/52. Note the Log on the back.

I would also like to show you Plaintiff's Exhibit 12, which is a well drilled on the same property, and containing a Log on the back as to the Formation Material. I would like you to familiarize yourself with the Formation Material and the construction of this well described in Exhibit 12.

I believe it will show that it is a well 1,033 feet deep, with 20-inch casing the first 400 feet, and 16-inch outer diameter casing from 400 to 1,033, perforated all the way, is that right? [180]

A. Right.

Q. Looking again at the formation material as

(Testimony of Kenneth G. Brown.)

described on that Log in Exhibit 12, I would like to ask you if that contains sufficient information for you to form an opinion as to the type of ground or earth along the length of the well?

A. Yes, sir.

Q. Are you familiar with the drilling of wells in such type of formation material?

A. Yes, we have drilled in similar formations.

Q. I take it you drilled Rotary drilled wells, as well as Cable tool drilled wells? A. Yes.

Q. Now, assume, Mr. Brown, the well described in Exhibit 12, which is the well completed on or about May 7, 1953, assume that in the 16-inch outer diameter casing a 15-inch bit was placed in there, and that at approximately 477 feet it hit something and it would not go past that point.

Then a 12 $\frac{1}{4}$ inch bit was placed in the 16-inch casing, and it would not go past 458 feet.

Then a drill collar 10 inches in outer diameter was started down the 16-inch casing, and it took weight at 458 feet, and an impression block is put in the hole, brought out, and the driller goes back in with a 12 $\frac{1}{4}$ inch bit and drills through the bad place, and goes on to the bottom. Do you have an opinion as to what constituted the obstruction in the well [181] which I have described?

Mr. Burch: We object to the question on the grounds there has been no foundation laid for this man to have any opinion as to what was the obstruction in the well, merely by looking at State records, if the Court please.

(Testimony of Kenneth G. Brown.)

The Court: He may answer.

Q. (By Mr. Ragan): Do you have such an opinion? A. Yes.

Mr. Burch: We object again for the same reasons.

The Court: Go ahead.

Q. (By Mr. Ragan): And what is your opinion?

A. My opinion would be that the well had collapsed at that point, the 455 foot point, and that when the bit was put back in and was rotated to go through that, it would, my opinion would be they would drill the side off of the obstruction at that point.

Q. You mean a side off the casing?

A. Off the casing, yes.

Q. That would leave a break?

A. An opening.

Q. Assuming that is the fact, Mr. Brown, what would happen in the future? What would you expect to happen, as far as the activity of the formation material in that area?

Mr. Burch: Same objection heretofore made. Also that [182] it is speculative, if the Court please, and no foundation shown for this man to testify to that.

The Court: Objection overruled.

Q. (By Mr. Ragan): I think I will ask you to step to the board, Mr. Brown, and if you will draw a picture, a diagram of the well, so we can see the activity of the earth at that point.

A. (Witness draws diagram): In a general way,

(Testimony of Kenneth G. Brown.)

this is the surface of the ground, and your well is drilled into the ground in such a fashion with a static water level at some point.

When the pump is inserted in the well, and commences evacuating groundwater from the well, it withdraws down the level of the water inside the casing to some point lower than that of the groundwater outside of the casing, and over a period of time generally a cone is formed called the draw-down cone.

In other words, the head of the water inside the casing is this many feet lower than that that the groundwater would normally assume. Therefore, that causes the water to enter the well with a certain velocity, the velocity of the water entering depending upon the draw-down and the porosity of the formation surrounding the casing.

Well, then, if you have, in other words, this water entering with a certain velocity has a tendency to pick up [183] the particles of earth, or whatever it may be, which surrounds it.

The casing and the size of the particles which will then enter the well are, of course, dependent upon that entrance velocity and the size of the openings. So that in this case, if the drilling past the obstruction were to create a larger opening than had been put in there, the perforations that had been put in the well at the time of drilling, particles of larger size could very easily enter the well.

Q. Assuming they did, where would they go, Mr. Brown?

(Testimony of Kenneth G. Brown.)

A. In the case that you have outlined where the well was 20 inches in diameter for 400 feet, reduced at that point, and the pump bowls were set above the reduction, I would guess that the larger diameter particles would fall to the bottom of the well.

Q. What is the effect of a well having particles fall to the bottom of it?

A. Well, the effectiveness of a well is that as you reduce the head inside of the casing, as opposed to the head which exists outside the casing, this difference in head exists over the whole length or depth of the well, which permits, which means that at that point, regardless of the depth, there is a greater head outside of the casing than there is within it, the water tends to fill the void, go to the point of lower head. [184]

However, as the well tends to backfill through the dropping of particles, sand, whatever it might be, that effect is lost. The difference of head no longer exists, because the water cannot flow into the well and then flow readily up into the sand which has been deposited, so, in effect, you lose the effect of that depth of well.

Q. Relating to the perforations, we have assumed in this question this well was perforated from 400 feet to 1,033 feet?

A. Yes.

Q. What is going to be the effect on the area from which you can draw water?

A. As the well backfills?

Q. Yes.

(Testimony of Kenneth G. Brown.)

A. Well, the effective depth of the well will be just reduced by the amount of the depth that is backfilled with sand.

Q. Will that have any effect on the amount of water it is capable of producing, the well?

A. Yes, it will, if this area in question was producing water. If the area in question was dry, the well would have no effect. If the well was dry, you would lose the effect of that area.

Q. You may take your chair again.

Assume this same well, Mr. Brown, which we have described as cased to 1,033 feet, and assume it is deepened to [185] 1,375 feet, that the deepened area is of a coarse sand formation, and that the deepened area is not cased.

Do you have an opinion as to how long the deepened area will be available as a part of the depth of the well?

Mr. Burch: We make the same objection. No foundation laid, purely speculative.

The Court: He may answer.

The Witness: Yes.

Q. (By Mr. Ragan): What is your opinion?

Mr. Burch: Same objection, for the record.

The Court: He may answer.

Q. (By Mr. Ragan): What is your opinion?

A. If the area in question, the uncased area of your well was a yielding area, in other words, if the formations encountered through this deepened portion which were not cased were capable of yield-

(Testimony of Kenneth G. Brown.)

ing water in general, they will not stand up for any great length of time without casing.

The velocity of the water entering tends to break down the side wall, and in time you lose that deepened portion.

Q. Referring again to the type of material formation we have described here, do you have an opinion as to whether a well in this type of formation would pump sand? [186]

Mr. Burch: We make the same objection. No foundation laid.

The Court: He may answer.

The Witness: Yes.

Q. (By Mr. Ragan): And what is that opinion?

Mr. Burch: Same objection, for the record.

The Court: Same ruling.

The Witness: Yes, the Log is the type that one would expect that the well would yield a certain amount of sand along with this water.

Q. (By Mr. Ragan): And when the sand does come into the well, to come out, in the final analysis, does it all come out?

A. You mean, is it all pumped out?

Q. Yes.

A. No, not necessarily. Again that depends—may I refer to this again?

Q. Yes.

A. (Witness refers to diagram): Depending on the point where the sand enters the well, and the velocity of the water, in other words, your maximum velocity within the casing will be achieved at the

(Testimony of Kenneth G. Brown.)

point where the water enters the bowls. [187] Below that point successively down the well, the velocity will be less, because at the bottom a minimum amount of water enters.

As more water enters the well, the velocity picks up inside the casing, so at some point, depending on the velocity of the water and the size of the particle involved, it will, if it enters below the critical velocity point, it will drop to the bottom, taking any certain size particle. Above that point, if the velocity of the water is sufficient to carry it, it will enter the bowl and drop out.

Q. It will have the same effect of filling up the well as you have described?

A. Yes, it will go to the bottom and gradually fill your well up.

Q. I would like now to show you Plaintiff's Exhibit 10, Mr. Brown, which is a group of statements for repair to a well engine and pump, and beginning with the statement dated 7/22/53, I would like for you just to glance through or read through, and noticing the repair to the well itself, in terms of the bowls? A. Yes.

Q. Now, assuming a well in which there was a pump, and that pump required the repair which you have just looked at to its bowls, do you have an opinion as to whether that reflects a sand condition, or not? A. Yes. [188]

Q. Do you have an opinion as to whether it is an excessive or mild sand condition?

Mr. Burch: If the Court please, we will object

(Testimony of Kenneth G. Brown.)

again. No foundation for this witness to testify as an expert. He admits his own company doesn't handle pumps. Now, they are calling for his opinion on pump repair based on some bills before him, without any other fact in evidence.

The Court: Why don't you get a pump man. The witness says he doesn't know anything about a pump.

Mr. Ragan: All right. Fine.

Q. (By Mr. Ragan): Assuming, Mr. Brown, a well as originally described to you in the Exhibit 10, I believe it is, or Exhibit 12, is that right?

A. Yes. The second well?

Q. Yes. And assuming further the fact that it was re-entered in December of 1953, with the history of the break which you said, in your opinion, occurred, and the deepening, the uncased deepening, and the formation material generally there, do you have an opinion as to whether or not such a well in that condition was a good or bad well?

Mr. Burch: We are going to object again. No foundation laid.

The Court: You may answer.

Can you answer that, whether it is a good or bad well? [189] What do you mean by good or bad?

Mr. Burch: Not unless he is clairvoyant.

Q. (By Mr. Ragan): As to the equipment in the well, do you have an opinion whether it was?

A. What do you mean by the equipment in the well. The casings?

Q. Yes.

(Testimony of Kenneth G. Brown.)

A. Yes, I have an opinion on that.

Q. What is that?

A. Well, certainly, the fact that the well has collapsed and was then drilled out, why, certainly it isn't going to benefit the well.

Mr. Burch: If the Court please, we move that be stricken. He says "the fact that the well has collapsed." He is testifying to his own opinion as a fact. Certainly it isn't responsive to any question.

The Court: All right.

Q. (By Mr. Ragan): Mr. Brown, assuming that a well had a capacity of 2,000, 2,200 gallons per minute at the end of a growing season. Assume the year 1954, around October. That that well was then not used until April of 1955, when it was turned on at the next growing season.

Do you have an opinion as to whether or not [190] the capacity should or should not be the same at that time? A. Yes.

Q. And what is that opinion?

A. In general, the well will be as good or better. They oftentimes are better at the commencement of a growing season because of the standing water level, which tends to rise in winter when wells are not pumped, so as a general rule they are as good or better.

Mr. Ragan: That is all.

(Testimony of Kenneth G. Brown.)

Cross-Examination

By Mr. Burch:

Q. Mr. Brown, in your business, do you ever take and use an impression block?

A. Yes, frequently.

Q. What purpose does that serve?

A. The idea of the impression block is to, when you have an obstruction in a well, is to lower this block which has got a greased pad beneath it, you lower that down into the obstruction in question to attempt to determine just what it is.

Q. Will it show a well that is collapsed?

A. Not always. In fact, in collapse, usually not. In order for an impression block to make an impression, you have to have something sharp to indicate.

Q. That would be a break in the well wall?

A. Yes, a break is something—you couldn't expect to find [191] collapse. Not ordinarily.

Q. Are you familiar with a sand bridge?

A. Sand bridges, you mean, through the gravel?

Q. Yes. A. Yes.

Q. Does that occasionally occur inside a well?

A. Quite frequently in a Rotary well a sand bridge will occur.

Q. Is that in the nature of a collapse?

A. No, a sand bridge is through the gravel back here, the sand will bridge through the gravel and prevent the gravel from actually filling the void that is created (indicating on diagram).

(Testimony of Kenneth G. Brown.)

Q. That is on the outside?

A. That is on the outside of the casing.

Q. Did you ever get a sand bridge inside the casing?

A. Yes, not frequently. I have seen a couple.

Q. What do you do for those?

A. At the time when you go back and clean out the well, you knock them out.

Q. How do you knock them out?

A. We use a scow on a cable tool rig.

Q. Is that drilling them out?

A. That is in effect drilling them out.

Q. If there was a sand bridge in there, it could well [192] occur that would obstruct the drill, wouldn't it?

A. Yes, it is possible.

Q. And if a well driller with years of experience said it might have been a sand bridge in there, that well might have been what happened to it, as well?

A. Yes, it is possible.

Q. When you speak of the collapse of a well, do you mean the whole internal piping the pump is set in collapses?

A. Generally what happens to cause a collapse is that the formation surrounding the well, if you pump sand, tends in time, as you pump that sand, to create a void outside your casing, and as this void is created, it then leaves the formations above the sand unsupported, and oftentimes as those formations eventually cannot support their own weight, they give way, and they fall against the casing, will not completely collapse it. They tend to dent it.

(Testimony of Kenneth G. Brown.)

Q. Then this casing, instead of having collapsed, may have been dented, is that correct?

A. Yes. By collapse, you see what I meant. I didn't mean a complete closure.

Q. It might have been an indentation in the side of the casing? A. Possibly.

Q. That was possible. You noticed on one of the reports that the first bit that went down went to 470 some odd feet, [193] did you notice that?

A. I don't believe it is on these as reports.

Q. Then if I give you as a fact that the large bit first went to 477, and the smaller bit later stuck at 458, would that have any significance to you? A. A large diameter bit?

Q. The first passed this point where you have stated in your opinion a collapse occurred.

A. And then later it would not go to that depth again?

Q. The smaller bit then indicated there was pressure on that point, took on weight at that same point. A. At the same point?

Q. 455 as, say, opposed to 478, or some such thing. A. I would be puzzled by that fact.

Q. If I tell you that is a fact, would that change your mind as to the certainty that there was a collapse in this well?

A. It is difficult to answer that without having further facts.

Q. Have you ever drilled any wells in the Harqua Hala Valley? A. No, sir.

Q. Your company ordinarily uses a cable rig?

(Testimony of Kenneth G. Brown.)

A. We are primarily cable tool operators.

Q. And this was a rotary well drilled we are talking about? [194]

A. Yes.

Q. A rotary well.

A. We do less of rotary than we do cable.

Q. If I told you a well was drilled at approximately this same location with this same formation, and produced clear water instead of sandy water, would that change your opinion in any respect as to the sand formation, and the possibility of collapse?

A. No, sir.

Q. Why will one well produce clear water and another silty water in the same location?

A. That is a difficult question to answer. We have seen it happen many times over, wells that may be separated as little as 100 feet. I am not sure of the answer.

Q. If a well produces sand for a short time upon operation, and then clears up, what does that indicate?

A. That is a normal procedure. Nearly any well will produce sand for up to a couple of hours.

Q. If that is the case of this well after having been in operation for a number of hours, it clears up, it would be perfectly normal?

A. Depending on the number of hours. I would say a perfectly normal well in Arizona should clear up within four to six hours. Over that you begin to wonder a little.

Q. You say it would be normal for any well to be a little [195] better producer in the beginning of the

(Testimony of Kenneth G. Brown.)

growing season than at the end of the last pumping season, is that true? A. As a general rule.

Q. If I told you that this particular well at the end of the 1954 season was producing water sufficient for about 55 tubes, 2-inch tubes, at the heavy end of the growing season when it required concentrated doses of water, then was able to produce about 72 2-inch tubes at the beginning of the next season, would you say that was in good condition?

A. Yes, from that I would say so. I would say that would indicate the well was pumping more water.

Mr. Burch: That is all.

Redirect Examination

By Mr. Ragan:

Q. Approximately how many rotary drill wells have you been connected with, Mr. Brown?

A. I would have to make a guess. Our equipment is in and out.

Q. A number? A. Oh, thirty.

Mr. Ragan: Thank you. That is all.

Mr. Burch: One additional question.

(Testimony of Kenneth G. Brown.)

Recross-Examination

By Mr. Burch:

Q. I want to specifically tie this down, Mr. Brown. [196] Speaking of the well of which you testified there was a possibility of a dent or a collapse, and if that well used 72 2-inch tubes at the beginning of one growing season, whereas it had only used 55 at the close of the previous season, would you say that well was collapsed?

A. I couldn't answer that.

Q. The production would be that of a normal well that was in good repair?

A. The collapse will oftentimes not have any effect on the production of water, in that it won't completely close the casing.

Q. A collapse is not necessarily a lost well?

A. No.

Q. And if this well was able to produce 72 2-inch tubes in the beginning of the season, as against 55 at the close of the season, would you say it was in good producing condition?

A. I would say it was producing. As to the state of the repair, I have no way of knowing.

Mr. Burch: That is all.

Mr. Ragan: May this witness be excused?

The Court: He may be.

(Witness excused.)

ELMER F. SHEPARD

called as a witness in behalf of the Plaintiffs, having been previously duly sworn, testified further as follows: [197]

Cross-Examination
(Continued)

By Mr. Rehnquist:

Q. You are the same Elmer Shepard that has previously testified in this action? A. Yes.

Q. Did you in response to a subpoena bring with you gravel receipts pertaining to the well that was on your property at the time you sold it to Mr. Otto? A. I did.

Q. Could I see them, please?

A. Yes. (Handing to counsel.)

Mr. Rehnquist: May these be marked.

The Clerk: Plaintiff's Exhibit 15 for identification.

(Said documents marked as Plaintiff's Exhibit 15 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 15 for identification, was all that gravel used on this particular well that we have been discussing? A. Yes.

Q. And are those all the receipts you have for gravel used in that well? A. I believe so, yes.

Q. That represents all the gravel that was put into that well? [198] A. I believe so, yes.

Q. That represents all the gravel that was put into that well? A. That is right.

Q. The first sheet here, you will notice, bears

(Testimony of Elmer F. Shepard.)

dates of 6/2/53, and 6/3/53. That would be for gravel put in in June, 1953?

A. May and June.

Q. May and June?

A. That was what was added. That was another bill there.

Q. I am going to go through them all. And their second sheet here bears date of 5/8/53. That would be for gravel that was put in in May of 1953?

A. Yes.

Q. And the last sheet here bears dates of April 28, 1953, that was gravel put in in that month, is that correct?

A. That is 152 tons that was put in when the well was drilled.

Q. 152 tons when the well was drilled, and then this 5/8/53, that is 12.9 tons, is that correct?

A. That was added the next month.

Q. And then 13 tons Well Rock, and 12.7 tons Well Rock.

A. Was added in June.

Q. In June.

A. That filled the well. [199]

Q. And you never had any more gravel added to that well from June, 1953, until November, 1954, is that correct?

A. It was impossible. The gravel chute filled up, but we had gravel on the place to fill it, if it was necessary, but we assumed it was full, because it didn't take any more.

Q. You never added any more gravel?

A. It was impossible to add it.

Q. Am I correct in saying you did not add it, if

(Testimony of Elmer F. Shepard.)

it was impossible to add it? A. That is right.

Mr. Burch: Those never did get in evidence. We have no objection.

Mr. Rehnquist: That is right. I will offer them in evidence.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Said documents received in evidence and marked as Plaintiff's Exhibit 15.)

Q. (By Mr. Rehnquist): Mr. Shepard, calling your attention to Plaintiff's Exhibit No. 2 in evidence, is that your wife's signature? Take a look at it. A. As far as I know, it is.

Q. Do you know that she signed this?

A. Yes. [200]

Q. And that is her signature, then?

A. Yes.

Q. Mr. Shepard, what did you do with this property between the time that you entered into this Option Agreement in November, 1954, and the time that you sold it to Cal-Nine in January, 1955? Did you continue to use it?

A. No, I think we started up one time when Mr. Otto and his brother-in-law was on the property.

Q. That would have been in November, 1954?

A. I don't remember what month it was. It was when we was running the picking machines. That was the last time it was ever started.

Q. And that was at the time of this conversation

(Testimony of Elmer F. Shepard.)

you have previously described and heard Mr. Otto describe, is that correct? A. Yes.

Q. And the well was not started after that?

A. No.

Q. Did you retain possession of the property?

A. Naturally I did, until they took possession. It was about 30 days later. They were supposed to have taken possession February 1st.

Q. When did they actually take possession, if you know? A. Along in March.

Q. Did you request them to delay this taking possession? [201]

A. No, they were having some kind of trouble in California, I understand.

Q. That was not done at your request, then, that delay? A. No.

Q. So far as you were concerned, you were willing to turn the property over to them at any time they wanted it?

A. Any time they wanted it. February 1st was the date I was to give possession.

Q. And they had already paid you the payment called for at that time, had they not? They paid that at the time the Escrow Instructions were made?

A. Sometime in January, I believe.

Q. It was not at the title company, then, that they paid that? A. Yes.

Q. When you talked to Mr. Otto and Mr. Haas in November, 1954, this time that you had your cotton picking machines running, you knew Mr.

(Testimony of Elmer F. Shepard.)

Otto was not putting up the money by himself, didn't you? A. The first time I talked to him?

Q. No, at the time in November of 1954 when you had the conversation out by your pump.

A. I didn't know but what Otto was furnishing the money at that time.

Q. Did you know that Mr. Haas was interested in the property? [202]

A. I heard that they were to have several partners, maybe he was trying to raise the money to buy the place. I didn't know who.

Q. You had heard that Mr. Otto was not going to raise all that money himself, isn't that right?

A. No, not at that time. I didn't know what the situation was.

Q. I thought you just said you heard he was going to have several partners?

A. I did later.

Q. When did you hear that?

A. When we were drawing up the Option.

Q. That was in November of 1954, in Mr. Town-
er's office? A. Yes.

Q. You knew at that time, then, that Mr. Otto might be bringing several other people into the deal?

A. He was trying to bring several others.

Q. And you had no objection to that, I take it?

A. I don't see why I should.

Q. And you had no objection in January, 1955, to Cal-Nine Farms exercising this Option that had been granted to Mr. Otto and Mr. Haas personally?

(Testimony of Elmer F. Shepard.)

A. No.

Q. So long as they paid the money, that was all you were interested in, is that correct? [203]

A. That is right.

The Court: We will have our morning recess at this time.

(The morning recess was taken.)

The Court: You may continue.

Mr. Rehnquist: We have no further questions at this time.

The Court: That is all.

(Witness excused.)

Mr. Rehnquist: We will call Robert Lanford.

ROBERT L. LANFORD

called as a witness in behalf of Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Robert L. Lanford.

Q. Where do you live? A. Palo Verde.

Q. Where is Palo Verde?

A. It is about 7 miles west of Buckeye.

Q. What is your occupation, Mr. Lanford?

A. Field man.

Q. For whom?

A. Fannin's Gas & Equipment Company.

(Testimony of Robert L. Lanford.)

Q. What does it mean to be a field man for Fannin? [204]

A. Well, you travel around and see different farmers in the country there. I mean, it has to do with the sale of fertilizer and insecticide.

Q. You make trips to farms in the area, and make inspections, is that correct?

A. Yes, at times, yes.

Q. How big an area do you cover in your trips?

A. My area is from west of Buckeye, just as far west as I want to go there, usually around from Gila Bend, out Harqua Hala, and that district.

Q. Was that also your area last year?

A. Yes.

Q. About how many cotton farms did you have last year?

A. I wouldn't know definitely offhand. There were several of them. I wouldn't know definitely the exact number.

Q. Did you have occasion last year to visit the ranch operated by Mr. Otto? A. Yes.

Q. And what was the purpose of your visits to that ranch?

A. Well, at times there I sold him some fertilizer alone, and then later on I checked the fields for insects.

Q. About how often did you make those checks for Mr. Otto? A. About once a week.

Q. Did you inform him of the results of your checks? A. Yes. [205]

(Testimony of Robert L. Lanford.)

Q. Are you acquainted with the number of times Mr. Otto dusted for insects last year?

A. Not offhand I wouldn't know just how many.

Q. What is your educational background, Mr. Lanford?

A. Well, I went to grammar school, high school course, then I went one semester to the University of Arizona, then three years to Arizona State College at Tempe.

Q. What did you major in?

A. Agriculture.

Q. And you took agricultural courses at the Arizona State at Tempe? A. Yes.

Q. Are you familiar with the state of Mr. Otto's cotton crop as it went through last season?

A. Fairly well familiar, I suppose.

Q. And if you assume as a fact that he dusted four times for insects last year, would that in your opinion be an adequate number of times?

Mr. Burch: I think we will object to that. There is no foundation laid to show that this man knows how many times it is necessary to dust a crop, if the Court please.

The Court: He may answer.

The Witness: Well, it would be hard to say. I mean——

The Court: If you can't say, say you can't. [206]

The Witness: I can't say, then.

Q. (By Mr. Rehnquist): Let me put it this way. In your opinion, did Mr. Otto fail to dust a

(Testimony of Robert L. Lanford.)

sufficient amount of times if you assume he dusted four times?

Mr. Burch: If your Honor please, he has already said he can't say.

The Court: Yes, I think so.

Q. (By Mr. Rehnquist): Did you observe Mr. Otto's cotton crop around the first of June?

A. Probably so, within a few days one way or the other.

Q. In your opinion did you have a good crop in the making at that time?

A. Yes, it looked good early there.

Q. Did you have occasion to observe it around the first of July, or thereabouts? A. Yes.

Q. And did he have a good crop in the making, or apparently so, then? A. Yes.

Q. And did you have occasion to observe Mr. Otto's crop in August, 1955? A. Yes.

Q. Did it still appear to be a good crop? [207]

A. Well, yes. Most of the time there I would say there wasn't anything wrong with it. It looked fairly good.

Q. How about around the first of September?

A. It didn't look too good at that time, as I remember.

Q. And from your knowledge of that crop, did you have an opinion as to what the decline in appearance would be due to?

Mr. Burch: I think we will again make the same objection. No foundation that he knows what caused it.

Mr. Rehnquist: He testified he has seen it once

(Testimony of Robert L. Lanford.)

a week all during the summer, and he is a graduate of an agricultural school.

The Court: All right, go ahead.

The Witness: What was the question again?

Q. (By Mr. Rehnquist): Do you have an opinion as to what caused the decline in Mr. Otto's cotton prospects last year?

A. Yes, I could probably make—there would probably be several things there that would cause that. There was one thing there, it came from rains there and washed out some ditches, and I would say the general appearance of the crop there showed lack of water, now. I guess that would be the answer to it, it showed lack of water there.

Mr. Rehnquist: I have no further questions.

Cross-Examination

By Mr. Burch: [208]

Q. You say the crop looked good in June, July, and August, is that correct?

A. I believe so, I don't know definitely. Sometime in August there it may have shown some water stress there, but I don't know definitely the date on it there.

Q. When did you first observe the crop?

A. Well, as a rule I tried to go out there at least once a week, and it was sometime after it came up, of course, there, probably, say, in, oh, May, something like that.

Q. From May to August you never observed any water shortage on the crop, is that correct?

(Testimony of Robert L. Lanford.)

A. I don't believe so.

Q. And the damage to the crop appeared after the heavy rains out there, is that correct?

A. Yes.

Q. That damaged a number of the crops in the area, didn't it? A. I believe that is true.

Q. Mr. Otto still produced a crop on the property, is that correct, even though it was damaged?

A. Yes.

Q. Are you able to determine how much of the damage was caused by water shortage, and how much by rain damage?

A. No, I really couldn't say on that.

Q. Did you ever observe Mr. Otto refurrow that crop [209] after the rains?

A. I believe he did there, because at one time when the cotton was up pretty big there, he was in there after a rain trying to refurrow it out. It looked pretty big, but of course he was trying to get the rows in there to do it.

Q. Subsequently, there was rain again after that attempt, or was that the last rain?

A. I couldn't say.

Q. You don't know what the final status of the crop was, whether it got furrowed out or not?

A. No, I couldn't say.

Mr. Burch: We have no further questions.

Mr. Rehnquist: No further questions.

(Witness excused.)

Mr. Rehnquist: We will call Mr. Makin.

MARK MAKIN

called as a witness in behalf of the Plaintiffs,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Mark Makin.

Q. Where do you live, Mr. Makin?

A. In Buckeye, Arizona.

Q. You are here in response to a subpoena, is that correct? [210] A. That is right.

Q. What is your occupation, Mr. Makin?

A. I am salesman for the Rainbow Packing Company.

Q. What was your occupation during 1954?

A. Well, I was working for Elmer Shepard, and also for Safeway in 1954.

Q. And what was the nature of your work for Mr. Shepard?

A. I was farming his desert lands in Harqua Hala Valley.

Q. Were you an employee of Mr. Shepard's?

A. That is right.

Q. He paid you straight salary?

A. Yes, sir.

Q. Was there any partnership arrangement?

A. No, there was no partnership arrangement.

Q. You never had any partnership arrangement?

A. No, never had any partnership arrangement.

(Testimony of Mark Makin.)

Q. What amount did Mr. Shepard pay you?

A. He paid me \$60 a week.

Q. And you had occasion to irrigate for him during the summer? A. That is right.

Q. Calling your attention to that summer of 1954, what was the greatest number of 1½-inch siphon tubes you were able to run that summer?

A. Well, I run 65, between 65 and 70 1½-inch and 2-inch tubes. [211]

Q. What do you mean when you say 1½ and 2-inch tubes?

A. I had a few 2-inch tubes. I used those in order to push the short rows on down and make them run even all the way across.

Q. How many 2-inch tubes were there?

A. Ordinarily four or five.

Q. The rest were 1½-inch tubes? A. Yes.

Q. Do you recall the head at which you ran them? A. I am not with you.

Q. Well, the depth below the water level in the ditch.

A. I regulated them so they would all try to get out about the same time.

Q. And you had occasion, I suppose, to use the pump at that time? A. I serviced the pump.

Q. And was there a bonnet on it at that time?

A. Yes.

Q. And was there a—do you know if there was a flange on the bonnet at that time?

A. That is right, because I helped put it in there.

(Testimony of Mark Makin.)

Q. When did you do that?

A. Well, I have a book here that I kept on the place at the time. I will give you the dates when it was made. I had this flange made by the Lancey Welding Company on the 2nd, 12th, [212] 54.

Q. Could I see that?

A. "Welded head for discharge pipe."

Q. That was the date you welded it in?

A. We did it within a few days after that.

Q. Who helped you with that?

A. Woody Woods.

Q. Do you know his full name?

A. Woody Woods is all I know.

Q. Did you make these records at the time you did the work? A. That is correct.

Q. Did Mr. Shepard request you to make those records?

A. No, he didn't. I did it for my own use.

Q. How long did you work for Mr. Shepard that summer?

A. I worked for him from January until around the first of September.

Q. Did you work up until the first of September?

A. It was around the last part of August, the first part of September. I don't have the exact date on that. I don't know.

Q. Mr. Makin, with respect to these siphon tubes, were they going at a pretty good rate when you were running 65 to 70?

A. Well, we tried to even them up and make them all run [213] about the same.

(Testimony of Mark Makin.)

Q. Were they putting out a normal amount of water, normal amount of flow?

A. That is right.

Mr. Rehnquist: We have no further questions.

Cross-Examination

By Mr. Burch:

Q. Mr. Makin, I think you said this was in February, 1954, that you and Woods welded on the bonnet and flange, is that correct?

A. Yes, sir.

Q. What was the purpose of this bonnet?

A. To direct the water directly into the weir box. It was a small weir box, and at the time we didn't know which way we was going to face the discharge pipe, so I had made it north and south, and I had—and it was going into the narrow side of it, so therefore we put the bonnet on there to direct it into the weir box.

Q. What would happen if that bonnet was not on there?

A. It would have gone clear out over the weir box, because the discharge pipe was setting approximately three inches below the top of the weir box.

Q. You say the flange was put in at the same time, is that correct? A. Yes. [214]

Q. Why did you put that in?

A. In order to put a back pressure against the heat exchanger, and also against the gearhead. We had been having some trouble about the gearhead heating up, and we were trying to correct that.

(Testimony of Mark Makin.)

Q. Where did you get that idea from?

A. From Lyman Miller of State Tractor.

Q. Did he suggest such a device at the time?

A. Yes, he did. He suggested we go between your gearhead and heat exchanger and put a $\frac{3}{4}$ -inch pipe in there in order to put a back head in there, in order to get better circulation through the gearhead.

Q. Now, why didn't you follow that procedure?

A. At that time I talked to Elmer about it, and he said we better not at that time, so I did the next best thing.

Q. Did Mr. Shepard request you to put this flange in there?

A. No, he didn't know it for some time. He found out accidentally.

Q. Did it serve the purpose?

A. Yes, it did.

Q. Why was it necessary to put that in? Didn't you have a butterfly valve on it?

A. Yes, we did. On those handles we pull over to put pressure against that, the packing was loose across the top of [215] it, and the water was squirting all over, and in order to take care of that, we put this flange in there, and it served the same purpose.

Q. You were still on the property when the pump was pulled in 1954, is that correct?

A. Yes, sir.

Q. Did you have any occasion to sound the well at that time and see what its depth was?

(Testimony of Mark Makin.)

A. Yes, sir, I did.

Q. Do you recall when that was done?

A. On the 7th and 29th days of 1954, I bought three balls of twine, and they run between 275 and 300 feet. I checked for 300 feet, so I don't know, between 275 and 300, and we put those three balls of twine on a spring approximately 18 or 20 inches long, and we lowered that into the well, and it took it all the way down without no obstruction at all.

Q. Did it hit the bottom? A. No, sir.

Q. Did anybody observe you doing that?

A. Elmer Shepard did.

Q. Anybody else? A. Not that I recall.

Q. Did either one of the plaintiffs, or Mr. Cameron, to your knowledge, know about that?

A. I don't remember on that. [216]

Q. You were familiar with the flow of water from that well in January, 1954, weren't you?

A. Yes, sir.

Q. And in the beginning of the growing season in 1954, that would have been about April when you made your pre-irrigation?

A. Let's see. I've got that, too. I started the water on April 11, 1954.

Q. And when was the last time you ran water on the property of 1954? A. Of 1954?

Q. Yes.

A. Well, it was the last part of August of 1954.

Q. That was after the bowls had been pulled and reset, is that right? A. Yes.

(Testimony of Mark Makin.)

Q. Was there any difference in the amount of water? A. Not that I could see.

Q. It seemed to be about the same, is that correct? A. Yes.

Q. Was there anything the matter with that well, to your knowledge, during 1954?

A. Not that I know of.

Q. Did it always produce about the same amount of water? A. About the same. [217]

Q. Do you know what they did to it when they had the pumps out and bowls out?

A. No, sir, I don't. I wasn't up there.

Q. Where did you get your water during that period of time?

A. Gordon Cameron volunteered to let us have the water, and we took it and irrigated our property while the well was being worked on.

Q. Did you have any trouble getting that water down from Gordon Cameron's? A. No, sir.

Q. How did you do that?

A. From his half-section we run a ditch on the side of the fence, and went on down and connected it with our ditch and went on irrigating.

Q. What was the condition of the water when you started up that well and pump, Mr. Makin?

A. Well, it would be just a little cloudy.

Q. How long did it take to clear up that situation?

A. Sometimes it would take 15 or 20 minutes. Sometimes three or four hours. It all depends.

(Testimony of Mark Makin.)

Q. Would it always clear up? A. Yes, sir.

Mr. Burch: No further questions. [218]

Redirect Examination

By Mr. Rehnquist:

Q. You say the output was constant during the time you worked there, Mr. Makin? A. Yes.

Q. Didn't the output decrease shortly before the pump was pulled in August, 1954?

A. Well, I can't say whether it did or didn't. I don't remember.

Q. You don't remember that it was constant right around there? A. No.

Q. It might have decreased?

A. I couldn't say.

Q. When did you start to work for Mr. Shepard? A. Around the first of January, 1954.

Q. Did you ever say to Mr. Otto there had been no flange in the discharge pipe at the time you worked there? A. No, I didn't.

Q. You never made that statement?

A. I never made such a statement.

Q. Do you know the reason for the pump being pulled in August, 1954?

A. I don't know exactly the reason for it, no.

Q. Was it at your request it was pulled?

A. No, sir. [219]

Q. Whose request was it?

A. Elmer Shepard's.

Q. You didn't participate in the decision to pull

(Testimony of Mark Makin.)

that? A. No, sir, I sure didn't.

Mr. Rehnquist: No further questions.

Recross-Examination

By Mr. Burch:

Q. I think you did state when you ran the last irrigation, there was no difference then than there was at the beginning of the season?

A. That is right.

Q. As far as production?

A. That is right.

Mr. Burch: That is all.

(Witness excused.)

Mr. Rehnquist: I call Mr. Haas.

HENRY HAAS

called as a witness in behalf of the Plaintiffs,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Henry Haas.

Q. Where do you live?

A. Fresno, California. [220]

Q. How long have you lived there?

A. All of my life.

Q. How old are you?

A. 45. Except for two years, I didn't live there.

Q. Are you a shareholder in Cal-Nine Farms?

(Testimony of Henry Haas.)

A. Yes, sir, I am.

Q. Are you an officer? A. Yes.

Q. What office do you hold?

A. Vice president.

Q. Did you have occasion to come to Arizona in 1954? A. Yes, I did.

Q. When was that, do you remember?

A. Well, it was in November. I believe we left Fresno November 15th.

Q. And did you come over with someone?

A. Came over with Ernest Otto.

Q. That is the Ernest Otto who has previously testified in the action? A. That is right.

Q. What was the purpose of that trip to Arizona?

A. Well, he come over there in, I believe it was the end of October, and he said he would like to maybe buy a ranch over here, that is, the fellows he was picking cotton for thought it was a good buy, and this and that, and he wanted to [221] see about it, but he didn't have any money, I mean, actual cash, and a little short of it, so I says, well, maybe I can raise some. Therefore, I saw, oh, maybe a few of the fellows, four or five or six, and we decided, well, to put in a little money and help him buy it.

Q. And the purpose of the trip to Arizona was to actually effect the purchase of this land?

A. Yes.

Q. Or of some land?

A. Of some land, yes.

(Testimony of Henry Haas.)

Q. And did you have occasion while you were in Arizona in November, 1954, to have a conversation with Mr. Elmer Shepard? A. Yes, I did.

Q. And where did that conversation take place?

A. Well, it took place at his ranch right by the pump.

Q. Who else was present?

A. Ernest Otto.

Q. How did you happen to be out at the ranch?

A. Well, he had his cotton pickers going next door on the surrounding ranches, and we went out there and naturally had his workers there.

Q. Who is he? A. Ernest Otto.

Q. Continue. [222]

A. We stopped when we first got out there, we stopped where the boys were picking cotton, and he talked to his workers, and I was just standing around there and looking around, and this fellow Woody come up, and I believe he was hauling cotton, I mean, taking these trailers to the gin, and I just started up a casual conversation with him.

Q. Mr. Haas, I think right now it would be better if you would confine yourself to the details leading up to the conversation with Mr. Shepard.

Did Mr. Shepard come up to you while you were on the property?

A. Yes. We were there about 10, 15 minutes, when he come up, driving up in his pickup.

Q. What happened then?

A. Well, Ernie introduced me to him, and we got to talking about his ranch.

(Testimony of Henry Haas.)

Q. Did he at that time turn on the pump?

A. Well, yes, we talked to him about possibly buying the place, but he says, well, we would like to see how this pump works, and how much water it throws. Therefore, he started the pump.

Q. What was the appearance of the water coming out of the pump?

A. To me it looked like a stream was coming out.

Q. Did you notice anything about the water?

A. Well, it was muddy, yes.

Q. Did either you or Mr. Otto make any comment about that to Mr. Shepard?

A. Ernie says, "Gee, that water is muddy."

Q. Did Mr. Shepard make any response to that comment?

A. He says, "Yes, that is the way these desert pumps are."

Q. Yes.

A. And after you run them a while, it clears up.

Q. Did Mr. Shepard at that time make any other comments or statements to you about the well on the property?

A. Yes, I believe Ernest asked him how many gallons of water it was throwing, and he said one of them ranchers out there, I believe Turner is his name, had estimated that 2,400 gallons a minute, but he said he estimated it at 2,200.

Q. Did he make any other statements about the well?

A. Well, yes. We got to talking around there,

(Testimony of Henry Haas.)

and at that same time one of these, oh, I believe one of them cotton pickers come up there, the mechanical cotton pickers, he was off a ways, and Ernie walked off a way to take a look at it, that was a different brand than he was running, and I says to Elmer, I said, "Man, that sure looks desolate out there, all this desert. If there was no water out here, it wouldn't be worth anything."

He said, "Well, I'll almost bet my bottom dollar you've got enough water here for a cotton [224] crop.

Q. And did he state the size of that crop?

A. Yes, he said he had over 200 acres, 211 or 20.

Q. What crop are you referring to, Mr. Otto, the one on the place at the time?

A. Yes, that was on the ranch there. Then I had also asked him, if this was such a good place, why he was willing to sell it?

Q. And what was his response to that?

A. Well, he told me he had a quite a bit of trouble with his eyes, and that I believe he said he went to the Mayo Clinic about that. I am not sure, and had them examined, and that these doctors had told him to stay out of excessive dust, and that road out in this Harqua Hala Valley is tremendously dusty, and therefore he was trying to sell the place.

Q. Did either you or Mr. Otto inquire as to any trouble he might have had with the well or pump?

A. Yes, he asked him about trouble, and this and that.

Q. And what did he state in response to that?

(Testimony of Henry Haas.)

A. He said he just had the ordinary trouble, the ordinary trouble.

Q. Did he go into any detail?

A. Not too much. He just said he had the thing fixed, and that is all I know about it.

Q. Did you have any later conversation with Mr. Shepard after you left the well site? [225]

A. Yes, we did.

Q. Where was that?

A. Well, we made arrangements to meet at the motel that night. I believe that was November the 17th.

Q. And did you meet at the motel that night?

A. Yes, we did.

Q. Who was present?

A. I was, and Ernest Otto, Elmer Shepard, this fellow Woody, Elmer brought Woody along. And there was also Ed Diebert.

Q. Who is Ed Diebert?

A. He was working for Ernie at the time. He was one of the fellows running the cotton pickers.

Q. Was there any conversation with Mr. Shepard about the well on the land at this meeting at the motel?

A. Well, yes, casual like. He was just more or less telling us it was good. Of course, my main purpose at the motel there was about money. It was about money we were supposed to put down on the Option. In other words, that was why I was here.

Q. Did Mr. Shepard state to you at that time that the well was in good condition?

(Testimony of Henry Haas.)

Mr. Burch: If the Court please, he has already gone into that.

The Witness: He assured us—— [226]

Mr. Burch: Just a minute. He is putting words in this man's mouth.

The Court: Oh, he isn't putting words in the man's mouth. Reframe your question. It is leading.

Q. (By Mr. Rehnquist): Did Mr. Shepard make any statement to you about the condition of the well?

A. He done that all along. I kept asking him all along. Naturally you would be worried about the water condition.

Q. What was that statement?

A. Well, he said the well was in perfect condition.

Q. Whose money was that that went into the Option payment, the \$2,000?

A. Well, actually the money belonged to 8 fellows.

Q. And did they subsequently form the Cal-Nine Farms Company? A. They did.

Q. At that time, then, you contemplated that if the Option were exercised, it would be exercised by a corporation?

A. That is right. In fact, at the motel room there, why, Elmer thought \$2,000 for the Option was not enough. He wanted 5,000.

So, I told him I couldn't give him 5,000. Actually, I had my own money, I could have given it to

(Testimony of Henry Haas.)

him, but I says I wouldn't do that, because each fellow was putting in his share.

In other words, say a fellow wanted to commit himself [227] for \$5,000 he was putting in 500. That was the way it operated, 10% of the deal. And I says I wouldn't want to put more in myself, so at that time he knew that there were 8 other fellows besides Ernie.

Q. What is your occupation, Mr. Haas?

A. I build homes, houses.

Q. Do you do that in Fresno? A. Yes.

Q. Do you know anything about wells yourself?

A. No.

Q. Handing you Plaintiff's Exhibit No. 8, Mr. Haas, is that your signature on it?

A. That is, yes.

Q. Did you believe Mr. Shepard was telling you the truth when he made these statements?

A. Well, yes.

Q. And was the condition of the well on that land an important factor to you in deciding whether to purchase it, or not?

A. Well, yes. If there was no water there, the land was no good.

Q. If you had known that the well was actually in bad condition, would you have purchased the land at that price? A. No.

Q. Did you rely on what Mr. Shepard told [228] you? A. I sure did.

Mr. Rehnquist: We have no further questions.

(Testimony of Henry Haas.)

Cross-Examination

By Mr. Burch:

Q. You didn't know whether you were going to form a corporation or not in California, did you, Mr. Haas? A. Yes, I did.

Q. Isn't it a fact you were going to go back and talk to your lawyer over there, and decide what you should form?

A. No. Can I answer that question more fully?

The Court: All right.

The Witness: Well, when Ernie first come over with a proposition of buying the place, why, I contacted these fellows, and then my other brother-in-law called the attorney, and asked him whether that thing would work all right that way.

So we come over and picked up the Option, and then we went back and had a meeting right in the attorney's office, all nine of us.

Q. (By Mr. Burch): In November?

A. Yes.

Q. You didn't form the corporation until the following January, did you?

A. No, that isn't quite true. Can I qualify that?

The Court: All right, go ahead. [229]

The Witness: December the 13th, 1954, our name was approved, Cal-Nine Farms, by the State of California, and December the 23rd we got the Articles of Incorporation and, let's see, it was January the 7th, I believe, of 1955 we got the Seal, I believe you call it.

(Testimony of Henry Haas.)

So we were still in California at that time, and then when we had that, we come over here.

Q. (By Mr. Burch): When you came over with Mr. Otto, you already had your friends committed for the sum of \$80,000.00, hadn't you, you and Mr. Otto, and the other men altogether were committed to \$80,000.00, isn't that right, for the purchase of the land? A. I believe so.

Q. You didn't have any other land in mind but Mr. Shepard's, did you?

A. At what point are you referring to?

Q. When you and Mr. Otto came over in November? A. You mean the very first time?

Q. On the 17th of November, when you entered into the option agreement?

A. Did I have any other land in mind, you mean?

Q. You, or these eight men you testified went in with you to purchase this property?

A. We just had in mind whatever Ernie had in mind, that is all I know. [230]

Q. And Ernie had told you he had a piece of property he wanted to buy for \$80,000.00, isn't that right? A. That is right.

Q. And you had all agreed to go with him and buy it? A. Yes.

Q. And you had already put up your earnest money, so to speak? You had that in your pocket, \$2,000.00? A. That is right.

Q. You had already agreed at that time to purchase the land, hadn't you, among yourselves?

(Testimony of Henry Haas.)

A. Yes, if Ernie thought it could be bought, and that it was a buy.

Q. That is right.

A. None of the other fellows are farmers.

Q. They all relied on Ernie, didn't they?

A. That is right.

Q. And you did, too? A. That is right.

Q. You weren't relying on Mr. Shepard, were you?

A. When he talked to me and told me the well was in good shape, I certainly did.

Q. Of your own personal knowledge, you don't know whether the well was in good or bad shape, do you? A. No, I wouldn't.

Q. All you know is what Mr. Otto told you, is that correct? [231] A. That is right.

Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

Q. Mr. Otto had told you that? A. Yes.

Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn't he?

A. I believe he was relying on this Gordon Cameron's word quite a bit, his knowledge of the well.

Q. He had made some thorough discussion—he

(Testimony of Henry Haas.)

had had a thorough discussion with Mr. Cameron, is that correct?

A. That is what he said. That is all I know.

Q. At the time you talked to Mr. Shepard, this had all been done, hadn't it, the discussion with Mr. Cameron and the other investigation he made?

A. I believe so.

Q. And he had been on the property a number of times, hadn't he? A. That I don't know.

Q. Hadn't he told you that? [232]

A. He said he looked at the ranch. How many times he was there, I wouldn't know.

Q. The only thing that remained to do was to try to close the deal with Mr. Shepard, isn't that true?

A. On my part. That was my part, yes, as far as I know.

Q. When you had that meeting at the motel in Buckeye with a Mr. Otto, as already testified, there was some disagreement as to the terms, wasn't there?

A. Well, I don't know what you exactly mean by that.

Q. Do you recall him saying that he didn't have enough cotton allotment to purchase the property, to pay for it?

A. The cotton allotment was discussed. I don't know too much about cotton allotment, but he said he needed about so much allotment in order to make a go of the ranch, yes.

Q. He also at that time promised to put a house

(Testimony of Henry Haas.)

and a half a mile of cement ditch on that property if Mr. Shepard would reduce the amounts of the payments, didn't he? A. No, that isn't so.

Q. You never heard that? A. No.

Q. You heard all the discussion that was there?

A. I believe I heard most of it, yes.

Q. Did you ever leave the room while they were talking? A. No.

Q. Mr. Shepard was there, this man Woody, yourself, and [233] Mr. Otto, is that correct?

A. Yes. And Ed Diebert.

Q. He was in the shower, wasn't he?

A. Well, he wouldn't stay in the shower a couple of hours.

Q. He was in there part of the time, wasn't he?

A. Well, he might have been. It wouldn't have been no more than five minutes.

Q. Did he stay in the room the rest of the time, or did he leave?

A. No; he and Woody were more or less sitting on one bed, and Elmer was on the other one, and Ernie and I were sitting on chairs.

Q. Did you know this man Woody?

A. I knew him by sight, that is all.

Q. I think you said before you saw Mr. Shepard that day in November, you had stopped and seen Woody, is that right?

A. Like I say, I just had a casual conversation with him.

Q. Did you talk to him about the Shepard property?

(Testimony of Henry Haas.)

A. Yes. As we drove up, I says, "This place here"—the one they were picking on, which I believe was this fellow Gordon's, "sure looked a lot better than Elmer's place did." I mean, as far as I could see.

Q. Did he tell you anything about the Shepard property, in that respect? [234]

A. He said it just wasn't run right.

Q. Did you ask him about the water supply?

A. I did not ask him about the water supply, no.

Q. Do you know whether Mr. Otto talked to him about the water supply?

A. He may have. I don't know.

Q. Did Mr. Otto ever advise you he had talked to Woody about the water supply?

A. He told me he had talked to people around the neighborhood about the condition of the place.

Q. What did he tell you he had discovered about the water supply?

A. He told me it sounded all right to him, but it seemed like he just couldn't get to the bottom of it.

Q. Did he suspect there was something the matter with the water supply?

A. Well, not exactly, but nobody would exactly commit himself. I don't know.

Q. Who did he say wouldn't commit himself? Did Mr. Shepard ever not commit himself in anything? A. No.

Q. Mr. Shepard, did he tell you you couldn't investigate his property in any way?

(Testimony of Henry Haas.)

A. No; he just said the well was in good shape. That's all there was to it. [235]

Q. Did you ever ask for any information from Mr. Shepard that he failed to give you?

A. No; I didn't ask for any information outside of his word.

Q. And Mr. Otto told you he talked with the pump men about it, didn't he?

A. I don't know whether he did or not.

Q. You don't recall Mr. Otto ever telling you he had talked to the well men that drilled the well?

A. Yes. That would be Gordon Cameron.

Q. He did talk to him about it?

A. Oh, yes.

Q. You have heard Mr. Otto testify here in court that he thought the well was throwing about 2,000 gallons per minute at the time you and he looked at it that day?

A. I believe that is right.

Q. Did he ever tell you he thought it was throwing 2,000?

A. I can't remember, unless it was said there at the well head. He never told me anything about it later.

Q. He never told you that in his opinion the well was producing less than what Mr. Shepard had stated?

A. No; he took Shepard's word for it.

Q. I think Mr. Otto testified yesterday that the purported assignment made by you and he to Cal-

(Testimony of Henry Haas.)

Nine Farms was executed yesterday at noon, is that correct? [236]

A. That is right. But I have signed a lot of papers in Fresno, but I am not of a legal mind. That is all in our attorneys' hands. He and our secretary over there have the papers. Like I say, I have signed a lot of papers. I don't know what they are.

In fact, we have signed one paper to give Ernie the full operation over here.

In other words, he can do what he wants to. He can make an agreement with the gin, or with the bank, or whoever he wants to, because he is the largest stockholder.

Q. Did you bring your corporate minutes, as directed?

A. I called for them. They haven't arrived yet.

Q. Do you recall the corporation ever meeting at any time and authorizing this lawsuit?

A. Oh, yes.

Q. When did they do that?

A. I wouldn't know the exact date.

Q. Can you tell me approximately when that occurred?

A. I wouldn't know that. That is written down someplace. I don't know.

Q. You are perfectly willing to produce those minutes as soon as they arrive?

A. As soon as they come; yes.

Mr. Burch: No further questions.

The Witness: Could I qualify that thing? [237]

The Court: No. There is no question.

Mr. Rehnquist: We have no further questions.

(Witness excused.)

Mr. Rehnquist: Your Honor, we have some witnesses subpoenaed for 2:00 o'clock. We don't have any more here now.

The Court: How much longer will you take?

Mr. Rehnquist: Our remaining witnesses will not take more than 45 minutes.

The Court: We will recess until 2:00 o'clock.

(The noon recess was taken.) [238]

Friday, May 18, 1956—2:00 P.M.

(Court convened pursuant to recess.)

(Present: Same as before.)

The Court: You may continue.

Mr. Rehnquist: Might we have the Court's indulgence for one minute. We are discussing the possibility of stipulating as to some of the exhibits.

The Court: All right.

Mr. Rehnquist: Your Honor, by stipulation of counsel, may this be identified as the appropriate Plaintiff's exhibit and admitted in evidence, as the government loan figures on cotton for last year?

The Court: All right.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Said schedule of prices was received in evidence and marked as Plaintiff's Exhibit 16.)

Mr. Rehnquist: We will call Mr. Walmsley.

SIMCOE WALMSOLEY

called as a witness in behalf of the Plaintiffs having been first duly sworn, testified as follows: [239]

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Simcoe Walmsley.

Q. Where do you reside, Mr. Walmsley?

A. Buckeye.

Q. How long have you lived there?

A. About 10 years.

Q. What is your occupation?

A. Gin manager.

Q. For what company?

A. Western Cotton Products Company.

Q. Do you have several gins out in the Buckeye area?

A. Yes.

Q. And are you in charge of all of them?

A. Yes.

Q. And do you, in the course of your ginning operations, keep records of the cotton crops sent to you for ginning of the various farmers out there?

A. Yes.

Q. And those records are kept under your supervision?

A. Yes.

Q. And in the regular course of your business?

A. Yes.

Q. Have you at my request compiled from those records charts showing the cotton production of Mr. Cameron and Mr. Otto? [240]

A. Yes.

(Testimony of Simcoe Walmsley.)

Q. Do you have those with you? A. Yes.

Mr. Rehnquist: May these be marked for identification?

The Clerk: Plaintiff's Exhibit 17 for identification.

(Said documents were marked as Plaintiff's Exhibit 17 for identification.)

Q. (By Mr. Rehnquist): You, personally, made these from the records in your office, is that correct?

A. That is right.

Mr. Rehnquist: We will offer it in evidence.

Mr. Burch: If your Honor please, we have no objection to Mr. Otto's going in. As to Mr. Cameron's, I can't see that it serves any purpose particularly in the measure of damages unless all the records of the adjacent farms—we object without all the records be submitted to the Court.

Mr. Rehnquist: We believe that is a question of argument to the Court. We have the neighboring farm here and the man right next door and we feel that is a fair comparison.

Mr. Burch: In our examination of Mr. Cameron, he did point out it was not the same crop as Mr. Otto had, that he had been on the farm an additional year, and there was a difference in yield each year from the year before. I don't see how it has any probative value. [241]

The Court: It may be received to save time, but I probably will not pay any attention to it, just as so many things go in, the Court doesn't pay any attention to them, but it saves argument.

(Testimony of Simcoe Walmsoley.)

The Clerk: Plaintiff's Exhibit 17 in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit 17.)

Q. (By Mr. Rehnquist): Mr. Walmsoley, does the price paid for cotton depend in part on the staple length of the cotton? A. That is right.

Q. And is the Government Loan Chart a minimum price which cotton farmers received for the cotton that they plant? A. That is right.

Q. They could receive more than that?

A. That is right.

Mr. Rehnquist: We have no further questions.

Cross-Examination

By Mr. Burch:

Q. Are you familiar with the farms out in the Harqua Hala Valley, Mr. Walmsoley?

A. Yes.

Q. There are six or seven farms out there?

A. That is right.

Q. Do you recall the production of the Hollenstein farm [242] for last year?

A. Not exactly; no.

Q. Can you make an estimate?

A. About a bale and a half.

Q. The Massingale Farm?

A. A little less than two bales.

Q. How does that compare with the Cameron farm?

A. Cameron, I believe, made a little better than

(Testimony of Simcoe Walmsley.)

two. I don't know exactly for sure. Right around two bales, maybe a little more, maybe a little less.

Q. There was considerable difference in yield, then, in different farms out there last year, is that true? A. Yes.

Q. Do you know what that could be attributed to? A. No.

Q. Was there some rain damage out there?

A. Rain?

Q. Yes. A. Well, not bad. A few ditches.

Q. Was there much damage of any sort?

A. A few ditches were broken, not bad, just minor damage, I would say.

Q. Did you observe it yourself? A. Yes.

Q. The area was isolated out there as a result of the [243] floods, isn't that right?

A. That is right.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. Did you have occasion to go out and visit these different farms? A. Yes.

Q. And did you visit the farm being operated by Mr. Otto last year? A. Yes.

Q. Did you have occasion to look at his cotton crop around June 1st? A. June, yes.

Q. Did it appear to be good around that time?

A. Good, yes.

Q. Did it appear to be good July 1st?

(Testimony of Simcoe Walmsley.)

A. Yes.

Q. August 1st? A. Yes.

Q. How about September 1st?

A. I thought it looked pretty good. It was a good stand, and all that, but it was suffering for water.

Mr. Rehnquist: No further questions. [244]

Recross-Examination

By Mr. Burch:

Q. Did you observe the well or pump in operation out there?

A. I did the first of September.

Q. Did you observe it at any time prior to that?

A. Yes.

Q. Did it seem to be producing enough water for his crop at that time?

A. It was a pretty good well.

Mr. Burch: No further questions.

Mr. Rehnquist: May this witness be excused?

(Witness excused.)

Mr. Ragan: The next witness is Mr. Carter.

JAMES R. CARTER

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Ragan:

Q. Will you state your name, please?

A. James R. Carter.

Q. Are you here pursuant to subpoena, Mr. Carter?

A. Yes, sir.

Q. Where do you live?

A. 1937 West Weldon in Phoenix.

Q. How long have you lived in Phoenix? [245]

A. I was born and raised here, sir.

Q. What is your occupation?

A. I work for the University of Arizona as an Assistant County Agricultural Agent.

Q. How long have you worked in that capacity?

A. Since 1948.

Q. What is your educational background, Mr. Carter?

A. I am a graduate of the College of Agriculture of the University of California at Davis.

Q. The Davis College?

A. Yes, sir.

Q. And you graduated when?

A. In 1948, sir.

Q. And did you take employment right after that?

A. Yes, sir.

Q. And that was where?

A. At Yuma, sir, first.

Q. For how long?

A. I stayed there for the summer of 1948, and

(Testimony of James R. Carter.)

then transferred to Washington State at Yakima.
I worked at Washington State College.

Q. For how long? A. For two years.

Q. And then where?

A. I came back here to Phoenix. [246]

Q. At that time you were employed as an assistant?
A. Assistant Agent, yes, sir.

Q. Assistant Agent. And since 1950, then, is that correct?
A. Yes.

Q. Now, in your job, what does it have to do with cotton, if anything?

A. My program revolves around field crops, and cotton is one of the primary ones.

Q. Cotton is one of the primary ones. What does your job consist of itself, Mr. Carter?

A. I guess it would best be described as a consultant type thing, where information that is obtained from various experiment stations is taken by me or others like me to growers in the area.

Q. Does that have to do with all things in connection with the cotton crop, such as irrigation, and cultivation, and everything else?

A. Yes; all cultural operations.

Q. Are you familiar with cotton growing conditions in the Harqua Hala Valley?

A. Yes, sir.

Q. Assume a crop of cotton in that valley having been planted around early May, 1955, and if that crop were water stressed around the first of September, would continued [247] irrigation cause

(Testimony of James R. Carter.)

shock to such cotton plants, which would knock off some bolls as well as squares?

A. May I ask you to rephrase that, or ask it again?

Q. Surely. Assume a crop of cotton planted in the Harqua Hala Valley in May of 1955. If this crop progressed, and around the first of September, 1955, it was in a water stressed condition, would irrigation given to that crop at that time cause a shock, such as would cause the small bolls, flowers and squares to fall from cotton plants?

A. Yes, sir.

Mr. Burch: If the Court please, I object to that. No foundation laid for this man to answer. The question itself is vague and ambiguous. He says, "water stressed." He doesn't say how, for how long. It assumes many things not in evidence. No relationship to this trial. I don't see any probative value.

The Court: He may answer.

The Witness: There is a possibility that it could knock those types of plant parts off.

Q. (By Mr. Ragan): Are you familiar with the method of determining the gallon-per-minute discharge used to irrigate cotton? A. Yes, sir.

Q. Is that method in terms of a mathematical formula? [248]

A. The basic background is in a mathematical type formula.

Q. What is that type formula?

A. That is where flow is generally said to equal

(Testimony of James R. Carter.)

the area that material is flowing to, times the velocity that it passes a particular point.

Q. In the determination of the area, what do you need to know?

A. The dimensions of the tube or flume, or whatever it is that it is flowing through, sir.

Q. Is there a formula for area itself?

A. Yes, sir.

Q. Is that pi times radius square?

A. For a circle, yes, sir.

Q. For a siphon tube that you are familiar with in your experience, they are circles on the discharge end, are they not?

A. Yes, sir.

Q. And then to determine velocity, what do you need to know?

A. Your velocity is determined by the amount of drop that the material goes through, or the head times gravity.

Q. When you say the head, is that the inch drop from the water level in an irrigation ditch to the top of the discharge end of the tube? [249]

A. That is approximately correct, yes, sir.

Q. Are there any other elements that require to be known before this formula can actually be applied?

A. Yes, sir. Materials, each different kind of materials have what they call a friction factor, if you want to call it that, and also if the material flows through a straight type tube, or flume, or whether it has bends or crooks in it, and also the amount or the distance that it travels.

(Testimony of James R. Carter.)

Q. The length of the tube?

A. If it is the length of the tube.

Q. Assume a $7\frac{1}{2}$ -foot aluminum material irrigation siphon tube with three bends. What is the applicable coefficient of friction to this formula, if you know?

A. I can't say exactly what it would be, because it would have to be determined by actual trial.

Q. In your experience, do you have an opinion as to what the approximate coefficient of friction is?

Mr. Burch: If the Court please, the man has already said he would have to know——

The Court: No; the answer wouldn't help me a particle. You are wasting my time.

Q. (By Mr. Ragan): Has this formula of which you speak been tested scientifically, to your knowledge?

A. Yes, sir. [250]

Q. And where, if you know?

A. Two places that I know of, sir, would be the University of California. And there is an experiment station in Nebraska.

The Court: What do you want to prove by this witness?

Mr. Ragan: I want to prove by this witness, your Honor, that there is a method of determining the gallon per minute discharge of a tube mathematically, if you know the head, the level of the tube, and that you can, therefore, multiply the number of tubes you are using at that constant head, and determine the output of the well.

(Testimony of James R. Carter.)

Mr. Burch: I couldn't quite hear your statement. Was that last part in regard to output of the well?

The Court: Yes.

Mr. Ragan: I have a chart which this witness, through experience, knows to be accurate, which I wish to submit in evidence.

Mr. Burch: May I ask a question on voir dire, your Honor?

The Court: All right.

Q. (By Mr. Burch): Mr. Carter, even though you may know what is coming out the end of those tubes, out of the end of those discharge pipes, unless you know ditch seepage, evaporation, and a number of other things, you wouldn't know the output of that well, is that right? [251]

A. No. That is right.

Mr. Burch: That is all.

Mr. Ragan: May I proceed with this exhibit?

The Court: All right.

Q. (By Mr. Ragan): I now show you Plaintiff's Exhibit 18, which is a chart showing water discharge and gallons per minute, based on an aluminum tube, and carries the different tube lengths, and the diameters of the tubes, and the head factor.

Now, in your experience, have you had occasion to test this chart against aluminum tubes to know whether or not it is in your opinion accurate?

A. Yes, sir; these charts were made up from curves that are actual tubes that are run. I believe

(Testimony of James R. Carter.)

this particular one is made up by the University of California, College of Agriculture.

Mr. Burch: If the Court please, the answer is not responsive. He asked him if he had checked by experiment himself the results contained in that chart.

Mr. Ragan: I believe he said yes, sir, when I started out.

Q. (By Mr. Burch): Have you run those experiments yourself?

A. No; I haven't run the experiment to see if any particular tube has a particular capacity, but I have seen them checked against known capacities, so I feel this is approximately [252] correct.

Mr. Burch: I will again object. No foundation for this particular witness has been laid.

The Court: Go ahead.

Mr. Ragan: Do you want to see this?

Mr. Burch: No.

Mr. Ragan: May it be admitted in evidence?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 18 in evidence.

(Said chart was received in evidence and marked as Plaintiff's Exhibit 18.)

Q. (By Mr. Ragan): One more question, and that is this, if you are able, through this chart, to determine the flow capacity of one tube, then you were given the fact that 55 tubes of the same kind, the same diameter, the same length, and the same head are taking the full discharge of the well, is it

(Testimony of James R. Carter.)

then possible to multiply 55 times the chart showing for the one tube to determine the capacity of the well?

The Court: I don't see why that couldn't be done by anybody.

Mr. Ragan: Would you just answer that?

The Witness: Yes, sir; with this one exception of evaporation and seepage loss. [253]

Mr. Ragan: That is all; thank you.

Mr. Burch: That is all.

Mr. Ragan: Just a minute.

Q. (By Mr. Ragan): Mr. Carter, your experience as a cotton consultant to farmers in your job, do you have an opinion as to whether or not the lack of water hurts a cotton crop?

The Court: Oh, I will take judicial notice of that.

Mr. Ragan: Thank you, your Honor. May the witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Rehnquist: I call Mr. Verne Tower.

VERNE A. TOWER

called as a witness for the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. My name is wrong on the sheet. It is Verne, V-e-r-n-e A. for Adam. You have it Vernon on the sheet. Verne A. Tower.

Q. My apologies, Mr. Tower. Where do you live?

A. 516 West Vernon Avenue.

Q. What is your present occupation, Mr. Tower?

A. Retired. [254]

Q. What was your occupation in 1953 and 1954?

A. Pump and engine business.

Q. By whom were you employed?

A. State Tractor and Equipment Company.

Q. What was your job?

A. What we term it, sales engineer.

Q. And what were your duties?

A. To sell pumps, locate prospects, and sell our equipment.

Q. And did you have occasion to visit various ranches out in the Buckeye area in the course of that job?

A. Yes. All of them were our customers.

Q. Was Mr. Elmer Shepard a customer of yours in 1953?

A. Yes.

Q. And was he in 1954?

A. Yes.

Q. Calling your attention to the summer of 1953,

(Testimony of Verne A. Tower.)

Mr. Tower, did you have occasion to pull a pump for Mr. Shepard then?

A. Yes; we pulled a pump, I believe it was—I'm not too familiar remembering dates, but I would say it was during August.

Q. This is the summer of 1953 that would have been about three or four months after the well was drilled? A. Yes; we did. [255]

Q. And do you remember the reason for pulling the pump at that time?

A. The bowls were worn badly.

Q. And did Mr. Shepard make any statement to you to that effect before it was pulled?

A. No.

Q. Do you remember if the output of the well had gone down?

A. Yes; it had dropped off some.

Q. And what did you do at that time, Mr. Tower, to the bowls?

A. Replaced them with a different design bowl with different material in the bowls.

Q. What was the purpose for those newly designed bowls?

A. Trying to overcome the wear from the abrasive material that the well was producing.

Q. That would be sand?

A. Sand, silt and sand.

Q. Did you have occasion to pull that pump again the next summer, in 1954, Mr. Tower?

A. Yes; I believe it was 1954, some time in the middle of the summer.

(Testimony of Verne A. Tower.)

Q. And do you remember the reason for pulling it at that time?

A. The bowls were worn again. [256]

Q. And the output of the well declined?

A. It had dropped off. That is the reason we were trying to bring it back into capacity.

Q. Substantially? A. Quite a lot; yes.

Q. And what did you do at that time?

A. The bowls were remachined, and brought back to as near new condition as possible.

Q. Was that in accordance with your advice?

A. That was the only thing we could do.

Q. Did you suggest new bowls should be put on?

A. Yes; it was suggested new bowls.

Q. And Mr. Shepard did not do that?

A. Well, there was two factors there. One, the bowls, that would take about three weeks to get them, the new bowls, and right in the middle of his cotton crop, why, he couldn't wait three weeks for water, and the machining of the bowls, building the impellers up, and putting new rings in the bowls could get by until such a time that we could get the new bowls.

Q. Or Mr. Shepard could sell the property?

Mr. Burch: If the Court please, I don't think we need that kind of remark for your benefit.

The Court: I don't think so, either.

Mr. Rehnquist: My apologies to the Court. [257]

Q. (By Mr. Rehnquist): Mr. Tower, was that as satisfactory a remedy to the bowl condition as the replacement of the bowls would have been?

(Testimony of Verne A. Tower.)

A. No. I would say that you could never in remachining bowls build back the efficiency that the new bowls would have.

Mr. Rehnquist: No further questions.

Cross-Examination

By Mr. Burch:

Q. Mr. Tower, you state the well was, the bowls were pulled early in 1953 some time. Were you there prior to the time the bowls were pulled?

A. Oh, I was there on an average, I would say, twice a month to all of those wells in the project. Sometimes oftener.

Q. I understand when bowls are pulled from the pump, it is a matter of routine to repair them at that time, regardless of condition?

A. That is right.

Q. The farmers always send them in and anything that is necessary is done, is that right?

A. Yes; that is the usual practice.

Q. If a farmer isn't around, and the pump men pull a bowl, they will take it in as a matter of course?

A. No. That hasn't been our policy.

Q. It is a general policy for a farmer to have his bowls worked over?

A. With a farmer's permission and consent, the work is done. [258]

Q. This first set of bowls put in were a different design from the old one, is that correct?

A. That is right.

Q. Gordon Cameron had the same thing done,

(Testimony of Verne A. Tower.)

I believe, is that right? A. That is right.

Q. His type of design was just the opposite from Mr. Shepard's?

A. No; the replacement bowls were identical, both of them.

Q. That was sort of a sealed unit?

A. They were cast iron impellers with heavy porcelainizing.

Q. And what was the original type of bowls?

A. A semi-open impeller, with full bronze impellers.

Q. You are not a pump repairman, I take it?

A. No.

Q. You didn't do the work on these, I take it?

A. No.

Q. That was someone in your shop?

A. That is right.

Q. Did you go in and assist with that work at all? A. No.

Q. Did you ever see the work done?

A. Yes. [259]

Q. What was your occasion to go in and see it being done?

A. Just to see how they were getting along, how fast they could get that going again.

Q. Did you examine the new bowls put down in the shaft?

A. The new bowls were—yes, I looked the new bowls over.

Q. Did that mean a matter of breaking them down?

(Testimony of Verne A. Tower.)

A. No. From the suction end of the bowl assembly is visible the first impeller, and the second impeller.

Q. This first bowl, I take it, wore out during that summer of 1953, is that right? A. Yes.

Q. And they were not apparently the type that was necessary to do the job out there?

A. They were the type we had been using right along, and used a number of sets of them in that valley.

Q. Had you used that same thing with Gordon Cameron? A. Yes.

Q. Had he had the same experience with it?

A. He had the same experience with it.

Q. So you shifted the type of bowl you had been using?

A. Yes; trying for better material that would withstand the abrasive condition of the pumping.

Q. Then it was approximately another year before those bowls were repaired, is that right?

A. You are talking now about 1954? [260]

Q. 1954. A. Yes.

Q. Were you out there at the time they were pulled? A. No.

Q. Then your understanding as to the reason for them being pulled—who told you the reason for its being pulled?

A. They brought the bowls into the yard.

Q. That would have been a matter of routine, anyway?

A. That would have been a matter of routine. I

(Testimony of Verne A. Tower.)

think Mr. Shepard requested they take them in and repair them.

Q. Isn't it true there had been some trouble with the operation of the engine and portions of the shaft on that particular well?

A. That I couldn't tell you, sir.

Q. You don't know? A. I don't know.

Q. You don't know whether or not that was true, that the bowls were pulled in the first place?

A. No; I couldn't tell you.

Q. Then this was just a guess on your part as to the reason?

A. I am talking about the operation during the month of August.

Q. Your statement was based on what was discovered afterwards in the shop, is that right? [261]

A. During the month of August, during the earlier period when they pulled the pump, I was busy on one of the Air Force jobs, and was not on that particular job at all.

Q. That was when?

A. That was early in spring, I would say.

Q. You did know they had some difficulty with the operation?

A. I heard about it, and when I had an opportunity, I went out to see it. What I am speaking of is that that was done during the month of August.

Q. As a matter of fact, it was not done during the month of August, but the last week or so of July, isn't that correct?

A. All right, in August, I would say.

(Testimony of Verne A. Tower.)

Q. You weren't out there at the time that was pulled, I think you stated?

A. No; I wasn't there at the time they pulled the pump.

Q. How long had it been since you had been out there?

A. Oh, it had been a matter of two weeks, probably three.

Q. So you don't know what the situation was immediately prior to the time they were pulled?

A. No; I don't.

Q. Did you observe the well after the pump had been pulled and new bowls put in? A. Yes.

Q. Not new bowls, but a repair job? [262]

A. Yes. That brought the capacity up again.

Q. It did bring the capacity up? A. Yes.

Q. Repair of the bowls is a customary job in your occupation? A. It is customary.

Q. It is done every day, isn't it, down there?

A. Not every day, but we like to sell new bowls.

Q. You have a number of men down there employed in the repair of those bowls, haven't you?

A. Right.

Q. And as near as you know, the job was well done?

A. The job was well done and very satisfactory.

Q. That was pretty near at the tail end of the irrigating season. You had August and a lot of September left?

A. He had August and all of September.

(Testimony of Verne A. Tower.)

Q. If he started picking in September, he probably wouldn't be irrigating as much?

A. That is right.

Q. Do you know, as a matter of fact, he did start picking? A. No.

Q. You weren't out there?

A. I wasn't out there when he started picking.

Q. You were there about every two weeks?

A. It varied, until crops were laid by, and [263] equipment more or less laid off, then we turned our efforts to something else.

Q. At the end of the 1954 season, the well was producing as well as it always had?

A. It wasn't producing as well as it did originally.

Q. When was that?

A. That was in 1953 when we started out.

Q. At the end of 1954 it was not doing that good, then? A. That is right.

Q. When did you make that observation?

A. After we installed the repaired bowls in the pump and reassembled the pump and put it to work.

Q. I thought it was your statement it did as well as ever.

A. No; my statement was you never can build back the efficiency in machining bowls as in new bowls.

Q. Did it produce a good head of water?

A. It was a fair head. I don't know the capacity. No attempt to say exactly. We say it was

(Testimony of Verne A. Tower.)

a half pipe, full pipe, three-quarter pipe. That's it.

Q. Did you ever make an estimate that it produced approximately 2,600?

A. I think at one time that well could have been between 25 and 2,600, just a rough guess.

Q. You had a conversation to that effect, didn't you, since the time Mr. Otto purchased the [264] property? A. No.

Q. Do you recall meeting Mr. Shepard and Mr. Cameron on the road one day out there and Mr. Shepard asked you as to the production of it, and you stated you thought it might not do 28, but it would do 2,600?

A. Which well are you talking about?

Q. Mr. Shepard's well, the one Mr. Otto was using. A. No; that well never did do 2,800.

Q. You said you did estimate it might have done 2,600? A. 25 to 2,600.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. At what time did you estimate it might have done 25, 2,600?

A. That was last fall, I believe, at one time.

Q. Which fall?

A. This past fall of 1955.

Mr. Rehnquist: No further questions.

(Testimony of Verne A. Tower.)

Recross-Examination

By Mr. Burch:

Q. That was when Mr. Otto was farming it?

A. Otto was farming it at that time.

Q. It had about 2,600 capacity at that time?

A. No; it didn't have 2,600 gallons capacity at any time [265] that Mr. Otto had it, and the latter part of Mr. Shepard's operation there the well was dropping off.

Q. I misunderstood your statement. I thought your statement was you estimated during last fall it might have got up to 2,600.

A. Originally when the plant was new.

Q. You don't know what it will do now?

A. No; I haven't any idea. In fact, I haven't been out in the area since the first of February.

Q. Of when? A. February of this year.

Q. You said you were unable to make an estimate of what it was doing in gallons after the last time the bowls were pulled for Mr. Shepard, is that correct?

A. That is right. He was getting sufficient water for the crop, and he was very happy, and we were very happy he was happy.

Mr. Burch: That is all.

Mr. Rehnquist: That is all.

(Witness excused.)

Mr. Rehnquist: Mr. Roberts.

C. K. ROBERTS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows: [266]

Direct Examination

By Mr. Rehnquist:

Q. Will you state your full name, please?

A. C. K. Roberts.

Q. Where do you live? A. Buckeye.

Q. How long have you lived there?

A. Since 1948.

Q. What is your business? A. Real estate.

Q. You conduct that business out at Buckeye?

A. Yes, sir.

Q. How long have you been in the real estate business? A. Since 1948.

Q. Have you been self-employed all that time?

A. No. For about four years I was with another broker. Since that time I have been self-employed.

Q. You have been self-employed since about 1952? A. Yes.

Q. Did you ever have occasion to visit the property owned by Elmer Shepard out in the Harqua Hala Valley during 1954? A. Yes.

Q. Do you remember about what time that was?

A. Well, it was about, after the planting season of cotton. I don't have the exact date. Probably May or June. [267]

Q. Did you have occasion to observe Mr. Shepard's well and pump at that time?

A. Yes; I saw it.

(Testimony of C. K. Roberts.)

Q. Do you know whether or not there was a bonnet on the spout at that time? A. A what?

Q. An elbow turned down on the spout at that time? A. No.

Q. Would you clarify that answer a little?

A. I do not recall of anything on the end of the spout. The water came out straight.

Q. It was just a straight spout?

A. As I recall.

Q. Did you have occasion to converse with Mr. Shepard during the summer of 1954 about selling the property?

A. Yes. He had offered his property for sale.

Q. Did he tell you at what price he would sell it?

A. Well, I didn't have a written listing, but, as I recall, it was \$80,000.

Q. And did Mr. Shepard later have a further conversation with you about that property?

A. Yes.

Q. And what was that conversation?

Mr. Burch: Let us have time and place, if your Honor please. [268]

Q. (By Mr. Rehnquist): All right, do you remember when it was? What time of year was this, this later conversation?

A. The later conversation?

Q. Yes.

A. It was during cotton growing season, probably July.

Q. And what was this conversation?

(Testimony of C. K. Roberts.)

Mr. Burch: Again we would like to know who was present, and where it took place.

Q. (By Mr. Rehnquist): Was anyone else present? A. No.

Q. Do you remember where this conversation took place?

A. As I recall, the second conversation, or conversation regarding a lesser price was on the street in Buckeye.

Q. And what was that conversation?

A. Well, as I recall, he said that if I had an interested prospect he would take less money than the original previous price.

Q. Did he give you any idea how much less?

A. Well, there was no stated amount less. It was assumption, I suppose, in my opinion, that it would be considerable less.

Mr. Rehnquist: No further questions. [269]

Cross-Examination

By Mr. Burch:

Q. Did you go out to the Harqua Hala Valley the first time to solicit Mr. Shepard's property for sale?

A. Did I go out to solicit it for sale?

Q. Yes. A. No; I don't recall that I did.

Q. What was your business out there that day?

A. When you are in the real estate business, and especially in an area that is developing, you are apt to be in the area quite frequently without any one specific thing.

(Testimony of C. K. Roberts.)

Q. You were looking for prospects to put their land up for sale, isn't that right?

A. You always are. At least I always am.

Q. And you talked to Mr. Shepard in that respect?

A. You mean out in the Harqua Hala Valley?

Q. Yes.

A. Sure, I talked to him, but I am not stating that it was there that he specifically told me his land was for sale.

Q. He never gave you any listing on it, did he?

A. Well, you mean a written listing?

Q. That is right. A. No, sir.

Q. There never was anything between the two of you in the way of a contract in writing, was there? A. No more than verbal. [270]

Q. His statement to you was that he wanted \$80,000 if the property was to be sold, is that right?

A. That is part of it, yes.

Q. You say you met him on the street. When was this? Several months later?

A. Several months later, yes.

Q. He didn't say he would take less, but indicated it, isn't that right, isn't that the idea?

A. He said he would take less, but, as I stated, he didn't state the amount less.

Q. How did you happen to run into him in Buckeye? Did you look him up? A. Oh, no.

Q. Just happened to be casually passing?

A. We met on the street.

Q. How long did that conversation take?

(Testimony of C. K. Roberts.)

A. It wouldn't take very long to make that much conversation. We Buckeye people are friendly enough that we might make quite a little conversation.

Q. Did you on that occasion?

A. Yes; we talked some little time.

Q. Did you ever talk to him on other times about his property? A. Oh, yes.

Q. When was that? [271]

A. I sure wouldn't have specific dates, but it was frequently, or occasionally.

Q. I think you said you talked to everybody in the Harqua Hala Valley, is that right?

A. No; I don't think I could say I talked to everybody in the Harqua Hala Valley.

Q. Did you talk to a number of people out there?

A. Yes; I have been in the real estate business and in desert land selling to the extent I realize you have to get around and see the land and see the people, and that I often do.

Q. So you went out, I take it, this first trip you ran into him, you were just out there scouting around, seeing what the situation was, is that right?

A. You mean regarding his land?

Q. Yes. A. No; I wouldn't say that.

Q. You said you didn't specifically go out to see him. You were going out to see as many people as you could, is that the idea?

A. No. Mr. Shepard's land is so located that you pass his land in getting to many pieces of property that I have for sale, and it is not unusual to simply

(Testimony of C. K. Roberts.)

be driving by and stop, and especially if he was around, and that I did on a few occasions. [272]

Q. This spout on the well, you have testified you cannot remember seeing a bonnet on it. Can you recall what the occasion was that you examined this particular discharge pipe?

A. Well, I didn't make any specific examination for any such thing. I just never saw it on there.

Q. Or never noticed it if it was on there, is that right?

A. That is right. I was at various wells, and that is one thing that anyone interested in agricultural operation of selling the land, or, I would say, even just plain curious, would appreciate seeing water flowing out in the desert.

Q. How big was the weir box next to that pump, do you know? A. No.

Q. Did the water discharge into the weir box?

A. Yes; as I recall, it did.

Q. The discharge pipe, as a matter of fact, passed over the weir box, didn't it?

A. No; I wouldn't recall that it did.

Q. You don't recall that it passed over one edge of the weir box?

A. Oh, yes; it may have passed into the—close enough to the weir box to run the water in naturally, or it would be very conspicuous. I probably would have noticed that.

Q. As a matter of fact, the weir box, the narrow edge faced the discharge pipe, didn't it? In other words, the weir [273] box ran lengthwise in this

(Testimony of C. K. Roberts.)

direction, if you can see my hand, pointing north and south, whereas the discharge pipe was facing east and west, so to speak? I am not sure the directions are right, but that was the situation? The length of the weir box was this way, and the discharge pipe was the short way?

A. The short way of the weir box. I sure don't recall that, no, sir.

Q. Is it possible that this discharge pipe had a bonnet welded on it so that it pointed the water down and you did not notice it?

A. Well, it is possible I just didn't happen, it just didn't happen when I happened to see it. It just wasn't there when I happened to see it.

Q. If it has been testified in this court that the bonnet was put on in February, 1954, could it have been possible that you looked at it prior to that time?

A. Well, it is possible, but it certainly was not on there when I looked at it.

Q. You testified that the discharge from the discharge pipe, the water flowing was not of force enough to go across the narrow strip of the weir box, is that right?

A. As I recall, there was no water being wasted. I would say that—I can't draw you a map of the weir box and just the size of it, or anything else like that—it was pumping water and it was going in the weir box, that is for sure. [274]

Q. Is it your testimony the water was going out straight like that and falling of its own gravity in

(Testimony of C. K. Roberts.)

the weir box, is that right? A. Yes.

Q. Do you have any idea how wide that strip was across the weir box?

A. No; I don't recall.

Q. Do you know whether there was a flange there at the time? A. No; I don't.

Q. Did you ever see the pump in operation in 1953? A. In 1953?

Q. Yes.

A. Yes; I presume I did in 1953 and 1954, I saw it pumping.

Q. Did you ever see it after this time in 1954 you speak of, in April or May, was it?

A. Yes; May or later.

Q. Did you ever go out there again?

A. Yes.

Q. Did you ever make any examination of the discharge pipe later on?

A. Well, no, I didn't. At one time when I was out there I was on the opposite end of the land where they were—I believe Mr. Shepard was there and irrigating at that time. But [275] I don't recall being at the well at that particular time.

Q. That was actually another different piece of property, wasn't it, altogether? A. Yes.

Q. Do you recall any time in 1953 you went and looked at the well?

A. Well, I was out there several times in 1953 and 1954.

Q. Specifically, if you can name the month, please.

(Testimony of C. K. Roberts.)

A. Well, I could sure hit a month by just saying the month. That was quite a long time to recall any specific date, and that would be very difficult. Nevertheless, I was out there several times during 1953, 1954, and 1955.

Q. Was there any other specific time that you can recall that you ever noticed the discharge pipe in this condition?

A. In that same condition, you mean, with a straight discharge pipe?

Q. Yes.

A. Oh, yes. When the pump was first pumped, I would say first pumped, it was in the early stages of development, I saw the pump working.

Q. That was in 1953?

A. Yes. It was a straight discharge, as far as I know.

Q. That is the memory you have of it now?

A. That is right.

Q. You don't know what its condition was in the fall of [276] 1954? You don't remember?

A. No; I don't. In other words, from the time I believe the pump was pulled, and so forth, and how it was put back in operation, I don't recall.

Mr. Bureh: That is all.

Mr. Rehnquist: No questions. May this witness be excused?

The Court: He may be.

(Witness excused.)

Mr. Rehnquist: The plaintiff rests.

First, we want to get in one more purely documentary thing.

May this be marked?

The Clerk: Plaintiff's Exhibit 19 for identification.

(Said document marked for identification as Plaintiff's Exhibit 19.)

Mr. Rehnquist: We will offer in evidence the certified copy of qualification of the Arizona Corporation Commission with respect to Cal-Nine Farms.

The Court: It may be received.

(Said document received in evidence and marked as Plaintiff's Exhibit 19.)

The Court: With that you rest?

Mr. Rehnquist: Plaintiff rests.

The Court: We will have the afternoon recess.

(The afternoon recess was taken.) [277]

The Court: You may proceed.

Mr. Burch: If the Court please, since counsel for the plaintiffs has rested, I have a motion to present at this time.

The Court: All right.

Mr. Burch: If the Court please, the defendants move for judgment for the defendants on the grounds and for the reason that plaintiffs have failed to prove the material allegations necessary in Complaint of Fraud; in that, first, they failed to show that this plaintiff, Cal-Nine Farms, ever entered into any agreement with this defendant, and

is nothing more than a mere assignee of Mr. Otto's and Mr. Shepard's rights as of noon yesterday.

Secondly, that the plaintiff was not in existence at the time of the alleged fraud, and, therefore, cannot complain of such.

Third, that an assignee under the rule of the Supreme Court in the State of Arizona cannot bring a fraud action. There is no common law right where a corporation, for a corporation to bring a fraud. Actually, the only way they could bring one as assignee is by statute, and there is no Arizona statute that provides that such an action be maintained.

Fifth, they have failed to prove the elements of fraud as set forth in the Arizona cases, to wit, they have failed to show that there was any knowledge of any false statement, or any reckless disregard of the truth on behalf [278] of the defendant, Elmer Shepard. They failed to show that he induced the plaintiffs to buy, but, on the other hand, by their own testimony have indicated they induced him to sell, and there has been no proof of damage, in that the evidence failed to show the value, the true value of the property, if the representations made by Mr. Shepard as alleged were correct, and the actual value of the property as they received it, which was necessary before any damage can be awarded.

Upon those grounds, and for those reasons, your Honor, we move for judgment for the defendant.

The Court: Motion denied. Call your first witness.

Mr. Burch: I will call Mr. Thiebeau.

ROBERT T. THIEBEAU

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Robert T. Thiebeau.

Q. Spell your last name.

A. T-h-i-e-b-e-a-u.

Q. Where do you live, Mr. Thiebeau?

A. In Buckeye, Arizona.

Q. How long have you lived out in the neighborhood? A. Approximately 51½ years. [279]

Q. What is your occupation?

A. Farm labor.

Q. Have you ever worked in the Harqua Hala Valley? A. Yes, sir, I have.

Q. Who have you worked for out there?

A. For the Mary E Farm, and also for Jimmie Walker Harrison.

Q. Are you acquainted with the land out there that was formerly the property of Mr. Elmer Shepard? A. Yes, sir; I am.

Q. Do you know Mr. Otto, who is seated here in court today? A. Yes, sir.

Q. Were you working in the Harqua Hala Valley last year? A. I was.

Q. Who were you employed by at that time?

A. Jimmie Harrison.

Q. Do you recall when the rains hit the Harqua

(Testimony of Robert T. Thiebeau.)

Hala Valley last year? A. I do.

Q. Do you recall approximately what time of the year that was?

A. That was in the last part of July and first part of August.

Q. How long did those rains continue out [280] there? A. Five weeks.

Q. What were the conditions generally of the country out there as a result of those rains?

A. Well, it was all flooded, as far as that goes, and Jimmie Harrison, he lost half a mile of cement ditch.

Q. What was the condition of the ground out there during that period of time?

A. Well, the condition was the ground was washed more than I had ever seen it washed.

Q. Were you able to travel out there?

A. Sometimes we were and sometimes we were not.

Q. How were you able to get around when you could travel?

A. With a four-wheel-drive Jeep.

Q. Were the roads passable?

A. No; they weren't.

Q. What did you have to do to travel out there?

A. We had to go around by Gordon Cameron's to get out through the desert.

Q. Gordon Cameron's property is immediately adjacent to the property Mr. Otto farms, is that right? A. That is right.

Q. Recalling to your mind about the first of

(Testimony of Robert T. Thiebeau.)

August at the end of those floods, did you have occasion at any time to participate in a conversation with Mr. Otto with regard to the damage done to crops out there? [281]

A. When we were coming back from Buckeye, I and Travis Shahan, and Mr. Brooks.

Q. Who is Brooks?

A. He is the fellow that worked out there with Mr. Harrison.

Q. And who was Travis Shahan?

A. He was the foreman for Jimmie.

Q. Go ahead.

A. And we come across Massingales. We was stuck in the truck, and we walked over toward Otto's ranch there, I and Travis and Mr. Brooks, and he came walking out, him and another man. I didn't know the other man.

Q. Mr. Otto?

A. Yes, sir. And he asked Travis what damage it had done to Jimmie, and he told him it washed out half a mile of cement ditch, and Travis asked him what damage did it do to you, and he said, "It ruined me."

Q. That was immediately after the rains, is that correct? A. That is right.

Q. What was your own observation of the country right there?

A. Well, I do know I had to refurrow it out. It was washed all clear through, and as far as I could see in any direction, there were approximately 5 to 6 inches of water running over the ground. In fact,

(Testimony of Robert T. Thiebeau.)

there at the trailer houses [282] where we were, there was 6 inches of water running through all of the airport, and all.

Q. Are you familiar with the general direction of drainage in that country? A. Yes, I am.

Q. Where does Mr. Otto's property lay in relationship to the natural drainage?

A. Well, from, I would say it lies from Gordon Cameron's farm, the drainage runs northeast.

Q. How would that affect Mr. Otto's property?

A. Well, the water from the mountains up there would be adrifted down right towards his direction of his farm.

Q. It was his statement on this day that you refer to that he had been ruined by the damage, is that correct? A. That is right.

Mr. Burch: You may cross-examine.

Mr. Rehnquist: We have no questions.

(Witness excused.)

Mr. Burch: We will call Mr. Brooks.

ROOSEVELT BROOKS

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please? [283]

A. Roosevelt Brooks.

Q. What do you do for a living?

A. Farm.

(Testimony of Roosevelt Brooks.)

Q. Who do you work for?

A. Mr. Jim Harrison.

Q. You work for Jim Harrison?

A. Yes, sir.

Q. Where do you work?

A. At the lower, the Hassayampa.

Q. Is that in the Harqua Hala Valley?

A. Yes, sir.

Q. Do you know Mr. Bob Thiebeau?

A. Yes, sir.

Q. Do you work with him? A. No, sir.

Q. He works on a different part from you, is that right?

A. Yes, sir. He was working during the time of the flood.

Q. You said he was working with you last year?

A. Yes; during the time of the flood.

Q. You speak up, Mr. Brooks, so we can hear you back here plainly. A. Yes, sir.

Q. You were employed out there in the Harqua Hala Valley last year, is that it? [284]

A. Yes, sir.

Q. Were you out there during the time of the floods and the rains? A. Yes, sir.

Q. Describe to the court, Mr. Brooks, what happened after the rains last year out there? What did the land look like?

A. It looked like just the water went out. It looked just like a desert. It was an awful wash.

Q. Was the drainage out there sufficient to cause any drift, carry any water across the fields, and that sort of thing?

(Testimony of Roosevelt Brooks.)

Let me ask you this: What did it do to the ditches out there?

A. Just washed them flat level.

Q. Do you know who Mr. Otto is?

A. No, sir.

Q. Do you know this gentleman here? Do you recognize him?

A. I have saw him.

Q. Your are not personally acquainted with him, I take it?

A. No, sir; not personally.

Q. Did you have occasion to hear a conversation between him and Mr. Shahan after the floods last year?

A. Yes, sir. [285]

Q. Who was present at that time?

A. Me and Bob Thiebeau.

Q. What, if anything, did Mr. Otto and Mr. Shahan have to say to each other in regard to the flood damage?

A. Oh, he was talking about the irrigation of the rainfall. He says, "That wrecked me."

Q. Who made that statement?

A. A man, that Mr. Shahan was talking to.

The Court: Do you see him here?

The Witness: Yes.

Q. (By Mr. Burch): The man in the blue shirt here?

A. Yes, sir.

Mr. Burch: That is Mr. Otto, for your information.

The Court. Is that all?

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: Your Honor, I have additional witnesses, but they are not available at the moment.

The Court: Have them here Monday afternoon at 2:30.

(Thereupon, an adjournment was taken to Monday, May 21, 1956, at the hour of 2:30 p.m.) [286]

Monday, May 21, 1956, 2:30 P.M.

FRANCIS J. LANCEY

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Francis J. Lancey.

Q. Where do you live?

A. In Buckeye, Arizona.

Q. What is your business?

A. I am a welding shop operator.

Q. You operate your own shop?

A. That is right. [287]

Q. How long have you been doing that?

A. Six years in this location, and I have been in this business for 27 years.

Q. Have you had most of your experience in the Buckeye area? A. Ten years.

Q. Are you acquainted with Elmer Shepard seated to my right here? A. I am.

(Testimony of Francis J. Lancey.)

Q. Mr. Lancey, at our request have you had occasion to check your records with regard to any work done for Elmer Shepard in 1954?

A. Yes.

Mr. Burch: May this be marked?

The Clerk: Defendant's Exhibit A for identification.

(Said document was marked as Defendant's Exhibit A, for identification.)

Q. (By Mr. Burch): I will ask you if you had occasion to make a bonnet for him in February of that year, for his well? A. I did.

Q. Is that the receipt that you—is that a bill or statement that you made to him for your work?

A. That is right.

Q. And that was your shop? [288]

A. That is right.

Q. What was the nature of the work you did?

A. We took a piece of round pipe and cut it at angles and made a segment of an elbow for a discharge pipe.

Q. When did you make that?

A. The date is there. I think it is in February of 1954.

Mr. Burch: We offer this in evidence.

Mr. Rehnquist: No objection.

The Clerk: Defendant's Exhibit A in evidence.

(Said document received in evidence and marked as Defendant's Exhibit A.)

(Testimony of Francis J. Lancey.)

Q. (By Mr. Burch): If it is dated February 12, 1954, that would be the completion date?

A. That is the completion date.

Q. Have you ever had occasion to make bonnets before in your shop for discharge pipes?

A. Yes, it is standard procedure for discharge pipes for a pump.

Q. It is not an uncommon occurrence?

A. No.

Q. Have you put them on discharge pipes yourself occasionally? A. Yes.

Q. What is the general purpose of making one of those [289] and putting it on a discharge pump? Or discharge pipe?

A. They have several purposes.

Mr. Rehnquist: We will object until there is some qualification that the witness knows the purpose, as opposed to just the mechanics of putting them on.

The Court: Go ahead, answer.

Q. (By Mr. Burch): What is the purpose?

A. They have several purposes. One purpose would be to divert water in a given direction instead of coming straight out.

Another purpose would be to keep children from throwing rocks down in the bowls. Another purpose would be to back force pressure up onto your cooling system.

The Court: Can you think of anything else.

The Witness: There is several different things they use them for.

(Testimony of Francis J. Lancey.)

The Court: Well, that is enough.

Q. (By Mr. Burch): How about a flange or baffle? Have you ever seen one of those put in a discharge pipe? A. Yes.

Q. What is their usual function?

Mr. Rehnquist: We will object on the same grounds.

The Court: Go ahead. [290]

The Witness: They are just used to give you a momentary back pressure that you can't derive from a butterfly, if you need just a little bit of pressure to cool your gearhead, and you don't want to run into a butterfly, so you back it up with a flange.

Q. (By Mr. Burch): Have you observed those on discharge pipes when wells are running?

A. Yes.

Q. Would that in your observation increase or make an appearance of increase in the supply of water coming out of the discharge pipe?

A. You can't increase water by plugging. You can cause more pressure, the more you squeeze it down, the more pressure you will have, but you get less water.

Q. Are you familiar with wells in the Harqua Hala Valley? A. Yes.

Q. Have you worked on discharge pipes in that particular district, you personally? A. Yes.

Q. Have you made an observation as to whether or not these bonnets are common procedure out in that area?

A. There is so many out there, and so many dif-

(Testimony of Francis J. Lancey.)

ferent people put them on. I don't know what other accounts. Our accounts do that. [291]

Q. I notice on this exhibit that this was billed to Elmer Shepard, and then there has been written on here by your office, apparently, the word "Mark." Who would that refer to?

A. That would be his foreman.

Q. You know who he is also, is that correct?

A. Yes, sir.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Mr. Lancey, defendant's Exhibit A here represents your invoice for welding a bonnet onto a regular discharge pipe, is that correct?

A. No, sir, it does not.

Q. What does it represent?

A. It represents making a bonnet.

Q. You didn't weld the bonnet on yourself, then, did you? A. No, sir.

Q. And did you or did you not put a flange in the bonnet at the time you made it?

A. No, sir.

Mr. Rehnquist: No further questions.

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: We will call Mr. Wood. [292]

ERNEST WOOD

called as a witness in behalf of the Defendants,
having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Ernest Wood.

Q. Where do you live now, Mr. Wood?

A. Gila Bend.

Q. What is your occupation?

A. Just farm labor.

Q. How long have you been farming?

A. State of Arizona for 20 years.

Q. Have you ever farmed in the Harqua Hala
Valley, or worked for anyone out there?

A. Yes, sir.

Q. Who did you first work for out in that dis-
trict? A. Mr. Cameron.

Q. When did you start working for him?

A. 1950.

Q. How long did you work in the Harqua Hala
Valley, the Harqua Hala area?

A. Well, sir, ever since it first started develop-
ing four years ago.

Q. Are you acquainted with Mr. Elmer Shepard
seated next [293] to me here?

A. Yes, sir.

Q. Do you know Mr. Otto seated in front of me?

A. Yes, sir.

Q. Do you recall when you first met Mr. Otto?

A. Yes, sir.

(Testimony of Ernest Wood.)

Q. When was that?

A. September of 1954.

Q. Where did you happen to meet him?

A. Out as Ray Stall's place.

Q. Where is Ray Stall's place?

A. Harqua Hala Valley.

Q. What were you doing out there at that time?

A. Ranch foreman for Mr. Cameron.

Q. What was Mr. Otto doing at that particular time?

A. He had some contracting, cotton picking.

Q. Did you see Mr. Otto occasionally after that, or regularly, or how often?

A. Yes, sir.

Q. Where did you see him?

A. Well, there on the ranch, and up at the house, Mr. Cameron's place.

Q. Did you ever know that he was interested in purchasing property in that area?

A. Yes, sir. [294]

Q. How did you determine that?

A. Well, at the time when we started his machines out picking, he was talking about the cotton, how good it was, and he said he would just like to own a place out in that particular part of the country.

Q. That was when?

A. The first day that I ever met the man.

Q. Did you ever have subsequent conversations with him about the property out there?

A. Yes, sir, several of them.

(Testimony of Ernest Wood.)

Q. Did you ever discuss the Shepard property with him? A. Yes, sir.

Q. Do you recall when that first came up?

A. Well, that was the first time I ever met the man, we were talking about land out there, and I told him I had heard this was for sale, and he was more than anxious to buy a piece of property in that particular part of the country, and he asked me to find out for him?

Q. Did you do that? A. Yes, sir.

Q. How did you go about that?

A. We talked and discussed the farm and the cotton I had there, which was a very good crop, which was something he wanted this land for, and Mr. Shepard was in bad health at that particular time, and I heard his land was for sale, or [295] he was talking about selling it, and I asked Elmer, and he told me it was.

Q. Did you advise Mr. Otto of that fact?

A. Yes, sir.

Q. Did you ever discuss the Shepard place itself with Mr. Otto at any time? A. Yes, sir.

Q. Do you recall approximately when that was?

A. Oh, well, that was probably at different times during the fall there, which is from the first time I met the man until he bought the place, it was just a steady routine, going over and over every time he was with me, we was talking about the valley and the land, Mr. Cameron's place and Elmer's place. It was adjoining.

Q. Did you ever have any discussion about the

(Testimony of Ernest Wood.)

water supply in that area? A. Yes, sir.

Q. Do you recall when you had that discussion?

A. That was several different times.

Q. Can you recall any of that specifically, when you discussed the wells?

A. One afternoon we were sitting there at home, and we were talking about Mr. Cameron's well.

Q. Who is "we"?

A. Mr. Otto and I. And talking about the wells, and he [296] asked me about these pumps in these wells. He said he was not familiar with them, and he asked me if I was. And I told him I had seen a lot of them pumped in 20 years. He wanted to know if it would go dry. I told him I hadn't seen any go dry yet. You never know. We discussed matters there, and I told him we had a little silt condition there at that particular place, and talked about the gravel packing, and I even started the well for him.

Q. That is Mr. Cameron's well?

A. Yes, sir. And the well was started several different times during the fall, and he was there picking. I had a little alfalfa I had to water several times, and I had to start my motor every other morning, because after you get your regular drawdown of your well—I had an overhead tank for domestic use—so when you get your well drawed down the silt would start.

Q. On this particular occasion when you started the well for him, Mr. Gordon Cameron's well for Mr. Otto, did you have any further discussion about the production of that particular kind of well?

(Testimony of Ernest Wood.)

A. Well, we was talking there on the actual production of the water, that is something I can't tell how much water is coming out of the well, and he said was there enough water there to take care of the cotton crop down there, which was very true, there was enough water there. [297]

Q. Did you ever discuss the silt condition any further with him?

A. The only thing, each time we were talking there there was silt, and he did ask me about what it cost to pull a pump and go into that, so I told him there it would take \$1,000 or more, which you had to do on account of this silt would cut the bowls out of the pump.

Q. How do you know it would cost a thousand dollars?

A. We had had this one pulled out, and I had seen several pumps pulled, just the general routine of the farming, you have to do those things. It won't set there forever without being repaired.

Q. Have you ever had any experience with pumps?

A. Yes, sir, I drilled quite a few.

Q. For whom? A. Gordon Cameron.

Q. You had worked with him? A. Yes.

Q. Did you ever discuss Elmer Shepard's well at any time with Mr. Otto? A. Yes, sir.

Q. What, if anything, did you say to him with regard to that?

A. He asked me, "How is Elmer's well in comparison with this one"? [298]

(Testimony of Ernest Wood.)

And I said, "No difference between the wells that I can see. I can't see any difference at all. However, Elmer's well will clear up a little faster than Gordon's will, the silt condition there."

Q. Did you ever know Mr. Ed Diebert?

A. I knew Ed. His last name I couldn't recall, a brother-in-law of Mr. Otto's.

Q. Did he do any work around that area at that time?

A. Yes, sir, he was driving a cotton picker.

Q. Do you know if he ever made any investigation of the property? A. Yes.

Q. What do you know?

A. He was down looking at the soil, and he also taken and got some jars and cans from me to take some soil samples to Mr. Otto to take to California.

Q. Did you know Mr. Haas?

A. I met the man, yes sir.

Q. Do you recall when Shepard sold the property to Mr. Otto?

A. I remember the conversation he had up here at this court that night.

Q. You were present at that time?

A. Yes, sir.

Q. Who was there that evening, if you remember? [299]

A. Well, there was Mr. Shepard, Mr. Otto, Mr. Haas, and Ed, he come in later, the other fellow there, and myself.

Q. Do you recall whether or not on that particular occasion, what the general conversation was, if you can remember, Mr. Wood?

(Testimony of Ernest Wood.)

A. Well, they was talking about the land, but it seemed that Mr. Otto and Mr. Haas, they wanted more cotton base, and Mr. Shepard told them no, he wouldn't let any more cotton go with the place other than what the ground held of its own. So then they kept talking. They talked a little while, and went on, but they still wanted more cotton.

He told them no. Then they said the payment was too high. And Elmer told them, well, he couldn't see any need of cutting his payments down too low, on account of he could lease his land for more or as much as the payments.

He told them he would put some improvements on this place.

Q. Who made that statement about improvements? A. Mr. Otto.

Q. Go ahead.

A. And if he could reduce the payments down they would do some improvement on the place, which was a home, and a half-mile of concrete ditch.

Mr. Rehnquist: We will object to that on the grounds of the parol evidence rule. The Option, and the Escrow Instructions [300] are both in evidence. We feel it shouldn't be varied. We move it be stricken.

The Court: Somebody has testified to that. I can't remember.

Mr. Rehnquist: They have already testified to it twice, your Honor, on questions asked of Mr. Haas.

The Court: It is in the record.

(Testimony of Ernest Wood.)

Mr. Rehnquist: The answer was no, your Honor.

The Court: Before?

Mr. Rehnquist: Yes.

The Court: I don't remember that. All right. It is written in the record. I suppose that would control if it is a written instrument.

Q. (By Mr. Burch): After the deal was closed, did you have any occasion to assist Mr. Otto on the property? A. Yes, sir.

Q. When was that?

A. That was when he first started his pump.

Q. Do you recall approximately when that was?

A. That was in April of 1955.

Q. Who started the pumps, Mr. Wood?

A. I started the pump going myself.

Q. Who laid out the tubes, if any were laid out?

A. There were a number of tubes laid out, and I believe [301] he and Ed laid them out, as far as I know. The tubes were laid out when I got there.

Q. How many tubes were there?

A. There was possibly 100 tubes, or better.

Q. When you started up the pump, did it work?

A. Yes, sir.

Q. What did you do then?

A. Let the water build up a little bit in the ditch, and started the tubes going.

Q. How many did you start? A. 72.

Q. Did you get them all running?

A. Yes, sir.

Q. Did you do any more that particular day, then?

(Testimony of Ernest Wood.)

A. No, just told him, showed him, and tell him how the water was to go, and how it helped to watch it. But he didn't stay. As I recall, he was gone, and he was very pleased with the well, and stood there and told me how proud he was of the place, which it is a nice place, very nice.

Q. Did you have occasion later on to do any more work on the property? A. Yes, sir.

Q. How long after you started it?

A. I believe 10 days or better.

Q. Did you have a chance to observe whether the well [302] was working at that time?

A. Yes, sir.

Q. Did Mr. Otto have a conversation with you about it at that time?

A. Only that he was still happy.

Q. Was it, to your recollection, 72 tubes you started that first day for him?

A. That is right.

Q. Mr. Wood, do you recall ever doing any work on the discharge pipe on that particular pump?

A. Yes, sir.

Q. Do you recall approximately when that was?

A. I believe it was around, it was between the 12th and the 18th of October of 1954.

Q. There has been some testimony that a bonnet and flange were welded on there in February of 1954. Do you know anything about that?

A. It was February, yes, sir. I was the man that done the welding, myself.

Q. Who did you work with on that, if you

(Testimony of Ernest Wood.)

worked with anybody? A. Mark Makin.

Q. What did you do?

A. He wanted just a little hood welded on there, so we welded the hood on. [303]

Q. Did you do any other work besides weld the hood on?

A. Yes, sir. We put a little flange out there. We cut a piece of tin about 3 inches on the bottom, and tapered it off to a piece hitched on the bottom.

Q. Where did you put that?

A. I left a little space at the bottom for this particular little piece of tin to set there, to hold the water up over this cooling system of the pump.

Q. Who requested you to do that?

A. Mr. Makin and I, we were just down there, so we decided it for ourselves. We thought it would be a good idea, and stuck it in there.

Q. That was in February, 1954, is that correct?

A. Yes, sir.

Q. Have you ever seen anything like that before, in your experience? A. Yes, sir.

Q. Is that a common occurrence?

A. That is a common occurrence. You just take and check your valve, and you find those hoods on many a well.

Q. Did you ever have occasion to sound that particular well?

A. Only just this one time we was down there, there was a string hanging in the well, and Mark and I was down there when they had the pump out of it repairing the bowls. [304]

(Testimony of Ernest Wood.)

Q. That was when? A. That was in 1954.

Q. What time in 1954?

A. I believe that was in July.

Q. What did you do in regard to sounding?

A. They had a string hanging there with a weight on it, and there was three balls of twine, so I picked this string up and lifted it up and down in the well, and it was very free.

Q. Do you know how much length of string there was on that?

A. Three balls of twine with 300 feet to the spool. It could have been 300, or maybe a little less or a little more. It was bought for 300 feet of twine.

Q. That would be approximately 900 feet?

A. Right.

Q. Were you there when the floods hit in 1955?

A. Yes, sir.

Q. Where were you working in the valley at that time?

A. I was four miles south and a mile east of Mr. Otto's place.

Q. Did you have the opportunity to observe conditions generally in the valley as a result of those rains? A. I sure did.

Q. What was that condition?

A. It was just a flood had come in there, and it was [305] just pitiful how deep the water was. The valley was a solid lake of water.

Q. What did it do to the property you were working on at that time?

A. It just practically washed it away.

(Testimony of Ernest Wood.)

Q. Who was the owner of that place?

A. Frank Bernard, and Jimmie Fulton, Lon Massingale has the lease on it.

Q. Did you have a chance to observe Mr. Otto's place?

A. No, I didn't get down to Mr. Otto's place, but I was by there shortly afterwards, that is, the upper end, by the corner of his place, then out by Mr. Cameron's place, the only way we could get out at that particular time.

Q. Why was it there was no other way?

A. Too much water. The place was washed away. We couldn't get out. In fact, I was water-bound for three weeks.

Q. You shut your water off, you say?

A. Yes, sir.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Would you state again for me the name of your employer last summer? Was it Fulton?

A. Jimmie Fulton, and Frank Bernard. They are the land owners. Lon Massingale was my employer. [306]

Q. And they raised cotton last summer?

A. Yes, sir.

Q. About how many bales to the acre did they make, do you know?

A. They didn't make two bales to the acre.

(Testimony of Ernest Wood.)

Q. How much short of two bales?

A. That I don't know. I never checked into that cotton.

Q. Would you say it was one and three-quarters?

A. Well, approximately a bale and a half.

Q. That was in spite of the rain?

A. Yes, sir. This was stub cotton. It wasn't planted cotton. There was a difference then.

Q. They hadn't planted any cotton, it was just stub?

A. We had gone and replanted, but it was stub.

Q. Would you tell me once more about that spool you put in the well. What was at the end of the twine?

A. On the end of the twine, I didn't see that, sir, but there was—Mr. Makin and Mr. Shepard had tied a spring onto it which was heavy, you know what I mean, you can tell if there is something on the end of anything, and it was very free. I picked the string up myself.

Q. While it was down? A. Yes, sir.

Q. You testified you worked on this discharge pipe; first I believe you said it was the week of October 12th [307]

A. I made a mistake.

Q. Now, it was the week of February 12th to 18th?

A. Between the 12th and the 18th. Not the 12th. Between that and the 18th.

Q. How do you remember the day?

A. We was picking cotton out there, to be exact.

(Testimony of Ernest Wood.)

We had the welder out there from the rig of Mr. Cameron's. We welded two trailers, one for Young and one for Elliot, and this welder was there, so we welded the hood on.

Q. They were picking cotton in February?

A. They were picking cotton on this particular place of Mr. Shepard.

Q. How does that happen to remind you of the date, the fact the trailers were welded.

A. Well, they just finished the weld on there, and the welder was there, and I did this welding.

Q. Did you make a mental note that this was the week of February 12th to 18th?

A. No, I didn't make a note that it was February 12th to 18th.

Q. You just recollect it now, is that correct?

A. Well, pretty close, yes.

Q. Did you say you were working for Gordon Cameron in the Harqua Hala Valley in 1950?

A. I was working for Gordon Cameron in 1950. [308]

Q. Not in the Harqua Hala Valley?

A. No, sir.

Q. When did you start working for him out in the valley?

A. In 1954. I believe it was 1954.

Q. How long have you lived there in Buckeye, Mr. Wood? Is it Wood or Woods? A. Wood

Q. How long have you lived in Buckeye?

A. Off and on I have lived in Buckeye for the past 18 years, Buckeye or Gila Bend.

(Testimony of Ernest Wood.)

Q. You are quite well acquainted with Mr. Shepard? A. Yes, sir.

Q. How did you first meet Mr. Shepard?

A. That was sometime ago. I knew Elmer, and have seen the man just like anybody, you know what I mean, and gone more or less like friends, like you or anyone else would meet a man. Sure, you just lived here so long that you just——

Q. How long ago was that? Do you have any idea?

A. I don't have an idea. Quite a ways back.

Q. Would it be ten years you say you have known him? A. Oh, yes.

Q. Do you see him quite frequently?

A. Sometimes it is a year before I see Elmer. Sometimes it has been two or three years before I have seen Elmer.

Q. Do you see him frequently on occasion? [309]

A. Not here lately, no.

Q. On other occasions have you? A. Sir?

Q. At other times, have you seen him frequently?

A. Just when he had the ranch there, we was neighbors. We neighbored quite a bit.

Q. Are you subpoenaed today?

A. I was subpoenaed the 17th.

Q. You were subpoenaed for the 17th?

A. Yes, sir.

Q. Your occupation now is farm laborer?

A. Yes.

Q. How long have you had that job with this particular outfit in Gila Bend?

(Testimony of Ernest Wood.)

A. I went down there a couple of months ago.

Q. What did you do before that?

A. I was with Mr. Massingale, and I was out in the valley there for Mr. Harrison a short time.

Q. How long were you with Mr. Massingale?

A. One year.

Q. With Mr. Massingale one year, and how long were you with Mr. Harrison?

A. I was there, and got another boy started with Mr. Harrison a little over two weeks.

Q. Who were you with before that? [310]

A. Mr. Cameron.

Q. And you were with Mr. Cameron about four years?

A. I was with Mr. Cameron from the spring of 1950.

Q. Who are you with now?

A. United States Government on the border of Mexico.

Q. How long were you on the border?

A. Two years.

Q. What did you do before that?

A. I was ranch foreman at Gila Bend for Mr. Sisson, worked for Mr. Sisson ten years.

Q. You had occasion to help Mr. Otto start the water in the spring of 1955? A. Yes, sir.

Q. How long were you over there that first day?

A. I was there long enough to start the pump and get the hose to running.

Q. Give me some estimate of time.

(Testimony of Ernest Wood.)

A. Probably three hours. When I got the hose to run I stayed around probably three hours.

Q. It was ten days after that you came back?

A. Yes, sir.

Q. You weren't there at all in the intervening period?

A. I was just across the fence several times, until I left Mr. Cameron and went over to Mr. Massingale's.

Q. Could you see across the fence the number of tubes [311] Mr. Otto had out? A. Yes.

Q. About how far is that?

A. From the fence to where his ditch was?

Q. Yes.

A. Approximately a couple hundred feet.

Q. Did you say there was water going through 72 tubes? A. Yes, sir, two-inch tubes.

Q. And did that continue for all of the three hours you were there? A. Yes, sir.

Q. You don't know how much, you don't know how many tubes were running after you left, I suppose? A. I didn't go back and check.

Q. Mr. Wood, how did you happen to be present at the motel that night of the conversation you have described to us about Mr. Otto buying Mr. Shepard's property?

A. Mr. Otto and Mr. Haas was out there, and I was there when they was talking about the deal, so they invited us in, so I went in with Elmer.

Q. You came in with Elmer? A. Yes, sir.

(Testimony of Ernest Wood.)

Q. When those 72 tubes started up, Mr. Wood, did you see any of them at all stop?

A. Yes, sir. [312]

Q. How many of them?

A. There was just a very few which they didn't let the water raise high enough in the ditch. They started to start the tubes a little too fast. Then you have always got to go and regulate your water, regardless.

Q. Some of those tubes did start?

A. Yes. I started them all, and they were all running.

Q. Then they stopped after that?

A. When I left, there was 72 tubes running.

Q. They were all running water through them?

A. Yes.

Mr. Rehnquist: That is all.

Redirect Examination

By Mr. Burch:

Q. Did you have occasion to assist Mr. Otto in starting his cultivator?

A. His furrowing out rig, yes. They wanted to rig up the cultivator, and they wanted to furrow out, so I was helping them.

Q. When was that?

A. About ten days after I started his pump I was over there.

Q. To rig the cultivator?

A. Mr. Shepard's brother flew in that afternoon

(Testimony of Ernest Wood.)

I was there and picked Mr. Otto up and flew him back to Buckeye. [313]

Q. They had already been working on it?

A. They had probably 8 or 10 rows ahead of it, so they asked me to come over and rig up the furrowing out rig.

Q. What was the purpose of that?

A. So they could run more water for their planting purposes.

Q. At that time they had enough water?

A. Yes, sir, they were water happy.

Q. That is all you saw, 2-inch tubes? Were there any stoppers in those tubes?

A. When I got down there we'd taken all those out. Mr. Otto helped me pull those inch-and-a-half plugs out of those 2-inch tubes.

Q. So you were running full 2-inch tubes?

A. Full 2-inch tubes.

Mr. Burch: That is all.

Mr. Rehnquist: We have no further questions.

Mr. Burch: May the witness be excused?

The Court: He may be.

(Witness excused.)

LYMAN MILLER

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch: [314]

Q. Will you state your name, please?

A. Lyman Miller.

Q. Where do you live, Mr. Miller?

A. Phoenix, Arizona.

Q. What is your occupation?

A. I would say I am a mechanic.

Q. Who do you work for?

A. Arizona Engine and Pump Company?

Q. What kind of work do you specialize in?

A. Mostly in pump and gearhead work.

Q. Do you recall doing some work on the pump at Elmer Shepard's farm in late July of 1954?

A. I do.

Q. I have a statement here from State Tractor with regard to that work. That was the job you did, is that correct?

A. That is right. We pulled it out and overhauled the bowls.

Q. What was the nature of the work you did on that pump at that time?

A. Well, we replaced the impellers and the shafting and the bearings in the bowl, and did some line shaft work on it.

Q. You personally either did the work or oversaw it done, is that correct?

(Testimony of Lyman Miller.)

A. I did the bowl work, yes.

Q. All that work was done in your shop? [315]

A. Absolutely.

Q. Who reinstalled it, then, in the well?

A. At that time, State Tractor's boys.

Q. And did you have occasion to see how it worked after it was reinstalled? A. I did.

Q. Had you ever seen that well before, Mr. Miller? A. I had.

Q. When did you first observe it?

A. When it was new, first put in, and I installed it.

Q. You had charge of the pump work at that time, too, is that correct?

A. I wouldn't say in charge of it. I am more or less troubleshooter for them, look after stuff like that.

Q. Had you had other occasions in 1953-1954 to see that particular well? A. Yes.

Q. You were familiar with it? A. Yes.

Q. After the installation and repair work you did in July, 1954, did you see the well when it was turned on and the water pumping? A. Yes.

Q. Was there a difference between the appearance of the water and its production at that time, and your other observations [316] of it?

A. Not that could be noticed.

Q. Would you say that was a complete overhaul of the pump?

A. Yes, I would say that was a complete job.

(Testimony of Lyman Miller.)

Q. What actually is done to restore a pump in a case like that?

A. It is pulled out, the line shaft checked, the bearings checked, and the bowls opened up. They are assembled, each bowl in itself is an assembly, and they are all pulled apart and inspected, and any parts that can be replaced up to as good as new is replaced.

Q. Did you do that on this particular job?

A. We did.

Q. Were you satisfied with your work?

A. Yes.

Q. Is there any basis on which you can judge how long such a repair job will last, Mr. Miller?

A. No, there isn't any that I could base on it. There is several conditions to take into consideration.

Q. Did you ever have another occasion to observe that particular well and pump?

A. Not after it was started, when it was overhauled.

Q. Did you have any occasion in 1955 or 1956 to look it over? [317] A. No.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. You didn't replace the bowls in July, 1954, did you, Mr. Miller? A. The bowl itself?

Q. Yes. A. No, sir.

(Testimony of Lyman Miller.)

Q. Did you see the pump installed in the well immediately before it was pulled for this job?

A. You mean when it was first installed?

Q. No, sir. Immediately before this job in July of 1954, did you have occasion to see the well in action?

A. No, I never seen the well pumped.

Q. At that time, you mean, or did you ever see the well pumped?

A. I have seen the well pumped.

Q. But not at that time?

A. Not just immediately before the pump was pulled.

Mr. Rehnquist: We have no further questions.

Mr. Burch: May the witness be excused?

The Court: He may be.

(Witness excused.)

Mr. Burch: Mr. Kimes. [318]

WILLIAM KIMES

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. William Kimes, K-i-m-e-s.

Q. What is your job?

A. I am a service man.

Q. Who do you work for?

(Testimony of William Kimes.)

A. Arizona Engine and Pump Company.

Q. How long have you been employed with them? A. Since a year ago November.

Q. Who did you work for prior to that?

A. State Tractor and Equipment Company.

Q. Those two organizations are side by side out here at 17th Avenue, aren't they?

A. More or less, yes.

Q. Your company formerly was with State Tractor, is that right? A. That is right.

Q. Did you have occasion in your capacity as a service man to ever go to the farm of Elmer Shepard during the years 1953 and 1954?

A. Yes, sir. [319]

Q. What was the nature of your contract for work, what did you do?

A. Primarily check service on the engine.

Q. How often did you do that during the 1954 season?

A. At the time we had it set up for a two-week check out in that area. With a rainy condition like it was at the end of the year, it figured out about once a month checking service on it.

Q. How about the pump, how often would it be checked?

A. Well, that was about every three weeks or once a month check service on the engine itself.

Q. When you went out to see his equipment, what did you do?

A. Check, set the valves, mag, gas pressure, gas

(Testimony of William Kimes.)

mixture, take care of any other trouble, any other trouble I would see.

Q. Did you routinely do that with the Shepard equipment? A. Sure.

Q. To your personal observation, in what kind of repair was that equipment kept?

A. It was in pretty good shape.

Mr. Burch: Cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Did anything ever go seriously wrong with that engine, [320] Mr. Kimes?

A. Seriously, it is a hard statement to make clear to people that don't know engine kind of work. We had one head that would either burn a valve or drop a valve. I wasn't on that job. It was in the first season, under warranty from the manufacturer.

Q. That would have been in 1953?

A. It was the first year, I believe, but other than that it was just minor tune-up work, mostly.

Q. Other than that, it was just minor standard service operation? A. That is right.

Mr. Rehnquist: We have no further questions.

(Testimony of William Kimes.)

Redirect Examination

By Mr. Burch:

Q. There was, as I understand, someone did the checking prior to your time with the company?

A. Yes, sir. Actually, I think I made, according to the records, I think I made about three checks when we first installed the engine, and the one salesman that was working with us at that time made four checks after that, and the rest of them I have taken care of.

Q. It was your procedure, then, I take it, if anything was needed, to furnish it, is that correct?

A. That is right. [321]

Q. That was whether Mr. Shepard was there or not?

A. That is right.

Q. And did you do that?

A. I certainly did.

Mr. Burch: That is all.

Mr. Rehnquist: That is all.

(Witness excused.)

The Court: We will have our afternoon recess.

(Afternoon recess was taken.)

The Court: You may continue.

Mr. Burch: Your Honor, I would like to recall Mr. Miller for just one more question.

The Court: All right.

LYMAN MILLER

recalled as a witness in behalf of the defendants, having been previously duly sworn, testified as follows:

Further Direct Examination

By Mr. Burch:

Q. Mr. Miller, did you ever have occasion to consult with Mr. Mark Makin in regard to that particular pump you have testified you worked on on occasion?

A. Yes, I have talked to Mark about it.

Q. Do you recall when that was, approximately?

A. Well, that was sometime before 1954.

Q. The well went in in 1953, as I understand it, is that [322] right? A. That is right.

Q. Did you have occasion to discuss with him specifically cooling the gearhead?

A. I think I have.

Q. Can you tell us what you advised him in that respect?

A. Mark mentioned to me that the gearhead was running awful hot, and in that particular head we have a cooling coil there to cool it. I suggested that to get more water up there and better cooling, that he form a pressure on the head, to get better cooling.

Q. How did you advise him to do that?

A. I advised him on the butterfly deal, where you could pull the butterfly around and crowd it and form a pressure, or he could use a siphon to

(Testimony of Lyman Miller.)

siphon the water through the head, or he could put a pipe in it.

The pipe would be inside of the discharge pipe right in front of the pump head, and would be sticking into the flow of the water, so it would create a pressure as the water flowed through the discharge pipe, and create pressure in the head.

Q. The object was to get an obstruction in the pipe to back up the water to cool the gearhead?

A. There had to be something to create pressure on the head, some kind of a device in order to cool the head.

Mr. Burch: That is all. [323]

Mr. Rehnquist: We have no questions.

Mr. Burch: Thank you, Mr. Miller.

(Witness excused.)

Mr. Burch: Mr. Shepard.

ELMER F. SHEPARD

called as a witness in behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Mr. Shepard, I believe you have testified previously under cross-examination, is that correct?

A. Yes.

Q. Recalling now the year of 1954, do you recall your first serious conversation with either Mr. Otto

(Testimony of Elmer F. Shepard.)

or anyone else with regard to the sale of your property?

A. The first serious conversation was in the motel at Buckeye.

Q. Did you have a prior conversation on your property with Mr. Otto?

A. A short conversation, yes.

Q. What were the circumstances regarding that? What were you doing that particular day?

A. I was busy picking cotton and hauling the cotton in, and so we made a date for later to meet, at a later time.

Q. And that date was that evening, is that correct? [324] A. That evening of that day.

Q. Had you had a notice that Mr. Otto and Mr. Haas were coming out on that particular date to see you? A. No.

Q. Had they ever advised you before that time they were contemplating buying your property?

A. No, other than at one time Mr. Otto had asked me what I wanted for it, but he didn't make any further commitment.

Q. And you met them that evening in the motel?

A. That is right.

Q. And as I understand, the Option was signed the next morning? A. Yes.

Q. That all took place approximately with a 24-hour period, is that correct? A. Yes.

Q. That was your total negotiations with them?

A. That is it.

Q. Had you made any offers or inducements with

(Testimony of Elmer F. Shepard.)

them to purchase your property prior to that time?

A. Any what?

Q. Any offers to them? Had you made any offers to them at all? A. No.

Q. And when you met at the motel with them, who was present? [325]

A. Mr. Haas and Mr. Otto, and Ernest Wood, and myself, and then this other brother-in-law was there part of the time, Ed Diebert, or Diebert.

Q. Did you ever at any time make any guarantees to them as to the production of the well?

A. No, sir.

Mr. Rehnquist: We object. It calls for a legal conclusion. I ask that it be stricken.

The Court: All right. State what was said.

Q. (By Mr. Burch): What did you say with regard to the production of your well, Mr. Shepard, if anything?

A. I told them that I couldn't estimate that, that they could count the tubes, and they might come to a conclusion by the number of tubes.

Q. Did you ever give them any approximation of the number of tubes you used on your property?

A. Yes.

Q. What was that?

A. Well, we usually start with 70 or better, and as the season progresses, we would reduce down a heavier flow of water.

Q. How long a row did you irrigate out on your property? A. A mile.

Q. Is that a normal length to irrigate? [326]

(Testimony of Elmer F. Shepard.)

A. No, it is not. It is about double what is usually irrigated, or maybe four times as long, probably.

Q. How many acres did you plant in 1953 out there? A. Let's see. 1953, 211 acres.

Q. And in 1944?

A. Let's see. 1953 was 320. And 1954 was the next year. It was 211.

Q. How did you irrigate that acreage?

A. With the well.

Q. Did you ever use water from any other source?

A. Yes, I used water on the 1954 crop from Gordon Cameron.

Q. For how long a period was that?

A. I don't remember exactly. Probably ten days. We were a little behind. We buckled the two wells together after we had it reinstalled.

Q. Did you get a crop that year, in 1954?

A. Yes.

Q. What was the condition of your well as you observed it at the end of the 1954 season?

A. Good condition.

Q. Did you use it at all between the end of 1954 and spring of 1955, when Mr. Otto took over?

A. No.

Mr. Burch: I think that is all. [327]

(Testimony of Elmer F. Shepard.)

Cross-Examination

By Mr. Rehnquist:

Q. Did you use water from anybody in 1953, Mr. Shepard? A. Yes.

Q. Who was that?

A. That was Jimmie Harrison.

Q. How many bales to the acre did you make in 1953?

A. I don't have that record. I had a tenant farmer at that time.

Q. Was it as much as one bale to the acre?

A. I couldn't say, because I actually don't know.

Q. Have you previously testified in a deposition that it was three-quarters of a bale to the acre?

A. It could have been. I don't know exactly.

Q. Are you familiar with the expression "head" when it is used in connection with the siphon tubes?

A. How was that again?

Q. Are you familiar with the expression "head" at which a siphon tube is being run?

A. No, I don't believe so.

Mr. Rehnquist: I have no more questions.

Redirect Examination

By Mr. Burch:

Q. You haven't received your payment this year under the terms of your contract, have you? [328]

A. No.

Mr. Burch: That is all.

(Testimony of Elmer F. Shepard.)

Recross-Examination

By Mr. Rehnquist:

Q. You did receive your payment, did you not, of \$2,000 on the Option, and \$18,000 from the title company for last year?

A. \$2,000 plus 18,000, that is right.

Mr. Rehnquist: That is all.

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: We rest, your Honor.

The Court: Any rebuttal?

Mr. Rehnquist: Yes, we will call Mr. Otto on rebuttal.

ERNEST OTTO

called as a witness, for rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Mr. Otto, you have heard Mr. Wood's testimony this afternoon? A. Yes.

Q. You heard him testify you stated you were pleased with the property in April, 1955?

A. Yes, I heard him say that. [329]

Q. And you heard him testify they were running 72 full tubes of water in April, 1955?

A. Yes.

(Testimony of Ernest Otto.)

Q. Did you ever make a statement about being pleased with the property, to Mr. Wood?

A. No, it was just the opposite.

Q. What did you say to Mr. Wood?

A. After I found out it wouldn't run as many pipes as they told me it would, I told him it looked like I got hooked on this place.

Q. How long have you been farming, Mr. Otto?

A. About 20 years.

Q. Is it ordinarily necessary for you to call somebody in to hook up a cultivator for you?

A. No, I don't believe so.

Q. You are capable of doing that yourself?

A. That is right.

Q. I believe you have testified earlier that as of June first, you expected a crop of about two and a quarter bales to the acre?

A. That is right.

Q. If that crop had materialized, would you have spent any more money in cultivation of the crop than you did?

A. No.

Q. What added expenses would you have been put to if [330] the full crop had materialized, that you weren't put to with the crop as it was?

Mr. Burch: If the Court please, I think it calls for an impossible conclusion.

The Court: Can you answer the question?

The Witness: Yes. The only added expenses I can think of is hauling additional cotton to the gin.

Q. (By Mr. Rehnquist): And what is the cost of that?

A. About a quarter of a cent a pound.

(Testimony of Ernest Otto.)

Q. And how many pounds of cotton is it generally necessary to haul to the gin in order to get a bale of cotton from the gin?

A. With machine-picked cotton, roughly 1,400 pounds.

Q. And was your cotton machine-picked?

A. That is right.

Q. Did you use the same ditch that had been on the Shepard property the previous year for your irrigations?

A. No, it wasn't the same ditch.

Q. How did you take care of it, then?

A. We worked it down and prepared the ground, and planted the crop, and then I rebuilt the ditch, but it was a ditch just like Mr. Shepard had used.

Q. It had the same dimensions? [331]

A. Roughly, yes.

Q. What would you say was the maximum head, using that ditch, that one could get for a siphon tube?

Mr. Burch: If the Court please, this man has already testified he couldn't even estimate the output of a well. I don't think he could testify to what a ditch would be that he never used.

The Court: He may answer.

The Witness: I would say about 8 inches.

Mr. Rehnquist: No more questions.

(Testimony of Ernest Otto.)

Cross-Examination

By Mr. Burch:

Q. You knew that ditch had been used the year before, didn't you, Mr. Otto?

A. Which ditch?

Q. The one that went from the Cameron property down to yours? A. Yes.

Q. And you knew Mr. Shepard had used that at the time for his cotton crop?

A. Part of the time, yes.

Q. I think you stated your cost of picking and hauling would have been a quarter a cent a pound?

A. No, I didn't. [332]

Q. What was that quarter a cent a pound?

A. Hauling that cotton to the gin.

Q. And you would also have had additional expense of pickers?

A. No. If I run the pickers through at one and a half on those bales, it wouldn't cost any more money.

Q. You stated you could operate that rig?

A. That is correct.

Q. You are familiar with what they sometimes call the tumblebug plow? A. That is right.

Q. Do you remember you were out there and pulled the string, and plowed yourself down the furrow?

A. Yes. I didn't pull the string. Someone else pulled it.

(Testimony of Ernest Otto.)

Q. Mr. Wood did come over and hook that rig up for you, didn't he?

A. No, absolutely not.

Q. As a matter of fact, it was Mr. Cameron's rig?

A. No, we used our own rig.

Q. You used your own rig?

A. We used Gordon Cameron's planter, not the rig.

Q. Did Mr. Wood show you about that?

A. He showed us about that, because it was a Case tractor, and I never used a Case tractor [333] before.

Q. I think you have testified you drilled a new well on the property?

A. I had it drilled, yes.

Q. And you brought water in at that time for use in drilling the well, isn't that true?

A. No, not me.

Q. Who did? A. Mr. Cameron.

Q. He brought in the water the same as he had brought it in before from his place? A. No.

Q. How was that done?

A. He let it in from a different direction altogether.

Q. Do you recall now the conversation with Mr. Wood in regard to the silt condition of the wells out there in that area?

A. No, I do not recall that.

Q. You do not recall that? A. No.

Q. Do you recall your brother-in-law getting soil samples from the Shepard property?

(Testimony of Ernest Otto.)

A. Yes, he brought them in to me one day.

Q. That was prior to you and Mr. Haas' conversation with Mr. Shepard, wasn't it?

A. I believe it was, yes. [334]

Q. And it is true, is it not, that when you and Mr. Haas came over you had never had any real conversation prior to that time with Mr. Shepard, with regard to the purchase of the property?

A. We had talked about it, and he told me what he wanted.

Q. You never made any offer? A. No.

Q. So when you and Mr. Haas arrived on the 17th of November with \$2,000 in your pockets, that was the first real negotiation you ever went into?

A. That is right.

Q. Those negotiations were closed the following morning? A. Following what morning?

Q. You got the option and everything the following morning in Buckeye?

A. That is right.

Q. And then Mr. Haas left immediately for California? A. That is right.

Q. Did you go back with him?

A. Yes, I believe I did.

Q. And you were both in a hurry to close that deal, weren't you, at that particular time?

A. I don't know that we were in a hurry.

Q. You got Mr. Shepard into the motel that evening and discussed the deal, took him to a lawyer the next morning, [335] isn't that true?

A. No, he took us to the lawyer.

(Testimony of Ernest Otto.)

Q. You dictated the terms of that agreement, didn't you? A. No, Mr. Shepard did.

Q. He did all by himself?

A. To Mr. Towner, that is right.

Q. As a matter of fact, you paid Mr. Towner that day, and have employed him since that time, haven't you? A. How was that?

Q. You paid Mr. Towner that day, and have employed him since that time, haven't you?

A. I still didn't get that question.

Q. Strike it. You and Mr. Haas on your arrival here had already decided in your minds to purchase that property, didn't you?

A. Well, half way. We were going to find out about the deal and what kind of terms it could be bought on.

Q. Your interest was in the finances of the transaction at that time, wasn't it?

A. Partly, yes.

Q. You had already told your friends in California you were going to buy the property if it could be bought?

A. The main thing we wanted to do was check up on the water phase.

Q. You hadn't done that in all your prior investigation? [336]

A. No, because I didn't have the money to buy the ranch.

Q. How long had Mr. Haas been working on it?

A. I would say he worked on it about a week after I told him there was a ranch over here that

(Testimony of Ernest Otto.)

was for sale. I didn't know what it could be bought for, or anything. Then he got several friends and got some money.

Q. When did you tell him what it could be bought for?

A. I told him Elmer asked \$80,000 for the place.

Q. When did you tell him that?

A. I don't remember the date when I told him, but when we were talking about the deal.

Q. When you came over you were prepared to pay \$80,000 for the property as it was, weren't you?

A. I guess, yes.

Q. And on that 17th and 18th, the day you arrived and looked the property over, and the next morning when you drew the Option, your only investigation of the deal was your conversation with Mr. Shepard, isn't that true?

A. Not just the conversation, no.

Q. What else did you do?

A. We looked over the ranch, and Elmer started the well for us, and we just looked the whole place over.

Q. You subsequently had talked to Mr. Cameron and Mr. Wood and Mr. Swindle about the property?

A. That is right. [337]

Q. You had been observing it some three months?

A. No, I didn't observe it three months.

Q. You had been on the property?

A. Twice, I believe.

Q. Mr. Thiebeau was on the property several times?

(Testimony of Ernest Otto.)

A. I believe he was there once when he got soil samples for me.

Q. You had been advised by other people in the community what it would produce in the way of cotton crop?

A. No, not what it had produced, what it was capable of producing. He said Elmer never raised a crop there.

Q. He never made any statements as to productivity of the land? A. No.

Q. And you observed yourself the kind of crop that was on it? A. Yes.

Q. You have since the time that you purchased the property had an offer from Mr. Cameron to buy it for just what you have got in it, isn't that right?

Mr. Rehnquist: I object to the question as irrelevant and immaterial on measure of damages.

The Court: He may answer.

The Witness: Yes, he offered to buy it after it had a good well. [338] Before that he said he wouldn't pay the price on desert land.

Q. (By Mr. Burch): When did he tell you that?

A. I don't remember the date. It was prior to the new well.

Q. Do you recall when you had the conversation with him?

A. It was during the summer, this past summer.

Mr. Burch: That is all.

Mr. Rehnquist: No questions.

(Witness excused.)

Mr. Rehnquist: Your Honor, the only remaining evidence is, and we would like to stipulate to it, rather than read it in evidence, is the deposition of Mr. Shepard. Rather than read it in, since it is being tried by the Court, we would like to stipulate that it is part of the evidence.

The Court: All right.

Mr. Rehnquist: That is all we have. We rest.

Mr. Burch: That is all we have.

The Court: How long do you want. Twenty, twenty, and ten?

Mr. Rehnquist: All right, your Honor.

Mr. Burch: That is all right.

The Court: All right, the Court will stand at recess.

(Case submitted.) [339]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 25th day of January, A. D. 1957.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed January 25, 1957. [340]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Cal-Nine Farms, a corporation, Plaintiff, vs. Elmer F. Shepard, et ux., Defendants, numbered Civ—2343 Phoenix, on the docket of said court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copies of minute entries, and of docket entry of January 10, 1957, are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated and the same are as follows, to wit:

1. Complaint.
2. Answer.
3. Amended Complaint.

4. Amended Answer, as shown in transcript (pages 2 and 3 of Reporter's Transcript of Record).

5. Minute entries of May 17, May 18 and May 21, 1956 (proceedings of trial).

6. Reporter's Transcript of Record.

7. Minute entry of November 23, 1956 (Order for Judgment).

8. Plaintiff's Proposed Findings of Fact and Conclusions of Law (being the same as document No. 11).

9. Defendants' Objections to Proposed Findings of Fact and Conclusions of Law.

10. Minute entry of January 10, 1957 (Order overruling objections to findings, etc.).

11. Findings of Fact and Conclusions of Law.

12. Clerks' Civil Docket Entry of Judgment, January 10, 1957.

13. Motion for New Trial.

14. Minute entry of March 1, 1957 (Order denying motion for New Trial).

15. Notice of Appeal.

16. Statement of Points on Appeal.

17. Deposition of Elmer Shepard.

18. Order Extending Time to File Record and Docket Appeal, dated April 15, 1957.

19. Stipulation Designating Record on Appeal.

I further certify that the original exhibits admitted in evidence are transmitted herewith as a part of this record on appeal, as designated, to wit:

Plaintiff's Exhibits 1 to 19, inclusive.

Defendants' Exhibit A.

Witness my hand and the seal of said Court this 12th day of June, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

Memorandum of Clerk's fees for preparing record on appeal, charged appellants: \$4.00.

[Endorsed]: No. 15599. United States Court of Appeals for the Ninth Circuit. Elmer F. Shepard and Kathryn Shepard, His Wife, Appellants, vs. Cal-Nine Farms, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Arizona.

Filed: June 14, 1957.

Docketed: June 24, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15599

ELMER F. SHEPARD and KATHRYN M.
SHEPARD, His Wife,

Appellants,

vs.

CAL-NINE FARMS, a Corporation,

Appellee.

APPELLANTS' STATEMENT OF POINTS
UPON WHICH APPELLANTS INTEND
TO RELY UPON THEIR APPEAL

The appellants above named, who have perfected an appeal to this Court from the judgment of the United States District Court for the District of Arizona, rendered January 10th, 1957, and the Order of said District Court denying said appellants-defendants' Motion for New Trial, which said Order was entered March 1st, 1957, intend to rely upon the following points upon their appeal to this Court:

1. The District Court did not have jurisdiction in the matter because the plaintiff-appellee was not a proper party plaintiff.

2. Such judgment is not justified by the evidence, and is contrary to law.

3. The District Court has not made adequate findings of fact upon the issues and pleadings of evidence.

4. The Findings of Fact proposed by the plaintiff-appellee and signed by the District Judge do not warrant the Conclusions of Law made and signed by said District Judge and do not support the judgment.

5. Plaintiff-Appellee's Findings of Fact Nos. 2, 4, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17 and 18 are not supported by any evidence, competent or otherwise.

6. Conclusions of Law Nos. 1, 2, 3, 4 and 5, proposed by the plaintiff-appellee and settled and signed by the District Judge do not, nor does one or more of them, contain a correct statement of the law applicable to the factual situation presented by the evidence.

7. The District Court failed to apply the proper measure of damages.

KRAMER, ROCHE & PERRY,

By /s/ F. H. BURCH,

Attorneys for Appellants.

[Endorsed]: Filed June 24, 1957.



No. 15599

In the
United States Court of Appeals
For the Ninth Circuit

ELMER F. SHEPARD and KATH- RYN M. SHEPARD, his wife,	}
<i>Appellants,</i>	
vs.	
CAL-NINE FARMS, a corporation,	}
<i>Appellee.</i>	

Brief of Appellee

CUNNINGHAM, CARSON & MESSINGER
and
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Phoenix, Arizona
Attorneys for Appellee

FILED

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TOPICAL INDEX

	Page
Statement of Jurisdiction.....	1
Appellee's Statement of the Case.....	2
Summary of Argument.....	10
Plaintiff's standing to sue for fraud.....	11
Sufficiency of evidence to support the findings of the Trial Court	22
A. Representation	25
B. Falsity of representation.....	27
C. Materiality	36
D. Speaker's knowledge of its falsity or ig- norance of its truth.....	37
E. Intent that the representation should be acted upon.....	38
F. The hearer's ignorance of its falsity.....	39
G. His reliance upon its truth	39
H. Proximate injury.....	44
Damages	44
(a) Measure of damages.....	44
(b) Application of these facts.....	48
(c) Exclusion of Cameron's testimony	52
Conclusion	55

TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
American S & R Co. vs. Riverside Dairy, 8th Cir., 236 F. 510, 513.....	49
Bishop vs. Strout Realty Agency, 4th Cir., 182 Fed. 2nd 503, 505.....	43
Crystal Pier Amusement Company vs. Cannan, 219 Cal. 184, 25 P. 2d 839.....	12, 13, 15, 17, 21
Curry vs. Windsor, 22 Ariz. 108, 194 P. 958.....	45, 53
Deatsch vs. Fairfield, 27 Ariz. 387, 233 P. 887, 891.....	17
Employers Casualty Company vs. Moore, 60 Ariz. 544, 142 P. 2nd 414.....	19
Gregory vs. Forester, 228 Ky. 201, 14 SW2nd 755.....	46
Healy vs. Ginoff, 69 Mont. 116, 220 Pac. 539.....	46
Ingalls vs. Neidlinger, 70 Ariz. 40, 216 P. 2nd 387	27, 47
Iowa Economic Heater Company vs. American Eco- nomic Heater Company, 32 Fed. 735.....	13, 14, 17, 21
L. C. James Motor Company vs. Wetmore, 36 Ariz. 382, 286 P. 180.....	37
Law vs. Sidney, 47 Ariz. 1, 53 P. 2nd 64.....	41
Lutfy vs. R. D. Roper & Sons Motor Company, 57 Ariz. 495, 115 P. 2nd 161, 165.....	44, 45
Nunn vs. Howard, 216 Ky. 685, 288 SW 678.....	45
Pacific Guano Company vs. Ellis, No. 6183 (Su- preme Court of Arizona).....	49

	Page
Perkins vs. Gross, 26 Ariz. 219, 224 P. 620.....	42
Rice vs. Tissaw, 57 Ariz. 230, 112 P. 2nd 866.....	37
Rodriquez vs. Terry, 79 Ariz. 348, 290 P. 2nd 248.....	20
Sacramento Suburban Fruit Lands Company vs. Miller, 9th Cir., 36 Fed. 2nd 922.....	53
Scholfield Gear and Pulley Company vs. Scholfield, 71 Conn. 1, 40 Atl. 1046.....	14, 15, 17, 21
Schwartz vs. Durham, 52 Ariz. 256, 80 P. 2d 453, 456	16, 21
Springer vs. Bank of Douglas, Ariz., 313 P. 2nd 399	41, 42
Standard Insurance Agency vs. Northeast Rapid Transit Company, 40 Ariz. 408, 12 P. 2nd 777, 780	26
State vs. Poolos, 241 NC 382, 85 SE 2nd 342.....	53
Thiel vs. Southern Pacific Company, 9th Cir., 169 Fed. 2nd 30, 32.....	52
United States Smelting Co. vs. Sisam, 8th Cir., 193 F. 293.....	49
United Verde Copper Company vs. Jordan, 9th Cir., 14 Fed. 2nd 299.....	49-50
United Verde Extension Mining Company vs. Ral- ston, 37 Ariz. 554, 296 P. 262.....	18, 19
Williams vs. Dodds, 9th Cir., 163 Fed. 2nd 724, 725	52
Wilson vs. Byrd, 79 Ariz. 302, 288 P. 2nd 1079, 1081	22
Woodmen of the World Life Insurance Society vs. Velasquez, 60 Ariz. 457, 139 Pac. 2nd 766.....	53

Authorities

A.R.S., Section 14-477.....	19
McCormick on Damages, Sec. 122, p. 454.....	46
Restatement of Torts, Section 525.....	27
Restatement of Torts, Section 526, Comment C.....	37
Restatement of Torts, Section 540.....	43
Restatement of Torts, Section 547.....	43
Restatement of Torts, Section 549.....	47
Restatement of Torts, Vol. 3, p. 114, Illus. 3.....	47
4 C.J.S. 580 (Appeal in Error), Sec. 291 (b).....	53
6 Fletcher, Cyclopedia Corporation, Para. 3868.....	26
28 U.S.C. 1332.....	1
28 U.S.C. 1291.....	1
76 A.L.R. 403, 408.....	20

In the
United States Court of Appeals
For the Ninth Circuit

ELMER F. SHEPARD and KATH- RYN M. SHEPARD, his wife, <div style="text-align:right"><i>Appellants,</i></div> <div style="text-align:center">vs.</div> CAL-NINE FARMS, a corporation, <div style="text-align:right"><i>Appellee.</i></div>	}	No. 15599
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Brief of Appellee

STATEMENT OF JURISDICTION

Appellee, plaintiff below, alleged in its complaint that it was a California corporation and a citizen of California, and that appellants, defendants below, were citizens and residents of Arizona. It also alleged that the amount in controversy in the case exceeded \$3,000.00 exclusive of interest and costs. (Tr. 3). These allegations were admitted by the answer of appellants. (Tr. 8). The District Court, in its Finding of Fact No. 1, found in accord with each of these allegations. (Tr. 33). The District Court had jurisdiction of the case under 28 U.S.C. 1332, and this Court has jurisdiction to review the judgment of the District Court under 28 U.S.C. 1291.

APPELLEE'S STATEMENT OF THE CASE

Appellee by its complaint sought to recover damages from appellants for fraudulent misrepresentations concerning a well on a ranch bought from appellants by appellee. Trial to the court resulted in a judgment for appellee in the amount of \$35,106.40. It is this judgment which appellants seek to reverse on this appeal.

Appellee is a California corporation whose organization under the laws of that state was completed on January 7, 1955. Prior to the organization of appellee, one Ernest Otto, a California farmer, had come to Arizona in October, 1954, for the purpose of picking cotton with his machine. He helped to pick cotton for several ranchers in the Harquahala Valley of Arizona, which runs north and west from the little town of Buckeye, Arizona. Buckeye is located about 30 miles west of Phoenix. He was told by these ranchers that defendant-appellant ELMER SHEPARD, hereafter called Shepard, wished to sell the ranch he owned in the Valley. Shortly after receiving this information, Otto talked to Shepard and was quoted a price of \$80,000.00 on the Shepard ranch. (Tr. 86-87).

Not having enough money to finance such a deal himself, Otto returned to California and consulted his brother-in-law, Henry Haas. With the help of his brother-in-law, seven other people in the Fresno area were interested in putting up some money for the purchase of the Shepard ranch if the ranch met with Otto's

approval. (Tr. 95; 129). They consulted a lawyer in Fresno, and were told that the best way to handle such a transaction was to incorporate.

In the middle of November, 1954, Haas and Otto returned to Arizona to further investigate the Shepard property. They had with them at this time \$2,000.00 in earnest money, put up on a pro-rata basis by the nine incorporators, if they decided to buy the property. (Tr. 129-30). On November 17, Haas and Otto went to the Shepard ranch for the purpose of looking it over and making inquiries. They met Elmer Shepard on the ranch, and there the conversations took place upon which this lawsuit is based. (Tr. 87-92).

Otto asked Shepard specifically what the output of the well was (Tr. 88), whether Shepard had ever had any trouble with the well (Tr. 90), and in addition commented adversely on the dirty appearance of the water which came out when Shepard turned on the well to demonstrate it. (Tr. 89). In response to these inquiries and comments Shepard stated that he thought the well was throwing 2200 gallons (Tr. 88), that he had had a little trouble which "you really couldn't class as trouble" (Tr. 90), and further stated that the dirty water coming out of the well was characteristic of the region when the pump was started (Tr. 89). Shepard also affirmatively stated that the well was in good condition. (Tr. 89).

Otto had farmed cotton for about five years, but his experience had been in the Fresno area of California. The wells there were shallow, and a set of bowls

on a pump would last from ten to fifteen years (Tr. 84). Otto had had no experience with the deep water wells used in the Harquahala Valley, and Haas had had no experience whatsoever with farming. Otto had made inquiry generally of several of the surrounding ranchers as to the Shepard property, but got answers which, though not unfavorable, were vague; in the words of Haas, he felt he "couldn't get to the bottom of it." (Tr. 277). Otto testified that to go further than a mere visual inspection of the discharge pipe of the well, and actually pull the pump, would cost around \$1,500.00. (Tr. 158).

At the same time, Shepard represented to Otto that the well would "run" seventy to seventy-five two-inch siphon tubes. (Tr. 91). As appears from the colloquy between the Court and Otto, the siphon tubes are pipes that are laid over a ditch bank to take water out of the irrigation ditch and into the actual furrows where the cotton is planted. (Tr. 91).

Following a further conversation at a Buckeye motel that evening, an option agreement, Exhibit A to defendant's answer (Tr. 9), was executed between Shepard and Otto and Haas on November 17, 1954. Shepard knew at the time of the execution of this agreement that Otto and Haas were contemplating the formation of a corporation, and he had no objection to a corporation taking up the option so long as he got his money. (Tr. 74). On January 11, 1955, escrow instructions to the Phoenix Title & Trust Company embodying the option agreement were executed, show-

ing E. F. Shepard and Kathryn M. Shepard, his wife, as Sellers, and Cal-Nine Farms, a California corporation, as Buyer. (Exhibit B to defendant's answer, inserted in transcript). Two thousand dollars had been paid at the time of the execution of the option, and an additional \$18,000.00 was paid upon the execution of the escrow instructions.

Otto, as President of Cal-Nine Farms, went into possession of the land in March, 1955. Shortly afterward, he commenced pre-irrigating the land preparatory to planting a cotton crop. (Tr. 98). At this time he set out some seventy two-inch pipes, but when the pump was turned on he was able to get only fifty-five of the pipes to run. (Tr. 99). When he discovered this, he made a closer examination of the discharge pipe. This pipe had a turned down spout, or "bonnet" on it, which made it rather difficult to examine; but by climbing into the weir box, stooping down, and looking up into the pipe, Otto discovered that there was a flange (a triangular piece of metal) welded into the pipe. (Tr. 99-100). There was considerable conflicting testimony about this flange; putting aside the purpose for which it was inserted in the pipe, Otto testified that it caused the discharge pipe to appear to be putting out considerably more water than it was. Based on this fact, and on the number of tubes which the well would run, Otto estimated the amount of water being put out by the well at the time he took over the land as being between 1300 and 1400 gallons per minute, although the output stream looked just as it had the previous November. This was in contrast to Shep-

ard's estimate of 2200 gallons as of November, 1954; it was also in contrast to Otto's earlier estimate of 2000 gallons, which had been made without benefit of attempting to run the tubes or the knowledge of the flange welded in the pipe. (Tr. 101). The only testimony on the question of the ordinary behavior of the output of the well between the end of the growing season, such as November, and the commencement of the new growing season, such as March, was by plaintiff's expert witness BROWN; he testified that a normal well would be at least as good in March as it had been the previous November, and probably somewhat better because of the tendency of standing water to rise in a well which is not being pumped. (Tr. 238).

Although the output of the well when Otto took over in March was substantially below what it had been represented to be, Otto still felt that if the output remained constant the well would supply him with enough water to irrigate his contemplated cotton crop. (Tr. 101-102). However, the output of the well declined steadily from its March capacity of between 1300 and 1400 gallons, and by July Otto was concerned lest the well fail entirely and he lose his cotton crop. At that time, he called in Gordon Cameron, a resident of Buckeye, a longtime friend of Elmer Shepard, and an experienced well driller who had done such work in California, Colorado, and Arizona. Cameron came out to the property, discussed the matter with Otto, and advised him never to turn the well off for the remainder of the growing season. Acting on this ad-

vice, Otto continued to keep the well on until September, even though by that time its capacity had declined to 250 gallons per minute and his cotton crop was suffering badly for lack of water. At that time, he turned off the well for good, feeling that further water at that stage for his already water-stressed cotton crop might do more damage than good. (Tr. 102-104; 197-198). The possibility of such damage was corroborated by the testimony of plaintiff's expert witness, JAMES R. CARTER, who was employed by the University of Arizona as an Assistant County Agricultural Agent. (Tr. 288).

In October, 1955, Otto again consulted Cameron as to what should be done with the well. Cameron at this time stated that the well was in such condition that it would not be feasible or advisable to attempt to repair it, and that the best course would be to simply drill a new well. (Tr. 226). Acting on this advice, Otto employed Cameron and did drill a new well a short distance away from the one which failed, and this well to date has proved to be a very successful one. (Tr. 199). The bowls on the pump were replaced with new bowls, since they had completely sanded up, but such of the pump machinery in the old well as could still be used was transferred to the new well. (Tr. 109). Cameron testified that everything done with respect to drilling the new well was necessary to obtain a good well. (Tr. 199).

The detailed testimony regarding the falsity of Shepard's representation and Shepard's knowledge

of that falsity will be treated in the appropriate section under the argument. For the purpose of this statement of the case, it will suffice to paraphrase the Court's findings of fact on this point: At the time that Shepard represented in November that the well would put out 2200 gallons per minute, it was incapable of pumping more than 1500 gallons per minute. The pump had actually been pulled four times in less than two years, and Shepard has spent over \$12,000.00 in an effort to salvage what the man who drilled it (Cameron) described on the stand as a bad well from the day it was drilled. The casing in the well was broken or collapsed at a point somewhere between 400 feet and 500 feet down. Shepard knew of the falsity of each of these representations. (Finding IX, Tr. 36).

Otto, on behalf of appellee, expended the sum of \$22,606.40 in drilling and equipping a new well which was the equivalent of what the other well had been represented to be. (Tr. 38; plaintiff's exhibits 3 through 5). In addition, Otto, farming on behalf of appellee, realized a yield from his cotton crop of only 116 bales for 105 acres planted. This was in contrast to his neighbor Cameron's yield of two and one-half bales to the acre (which would have given appellee 265 bales), and to even Shepard's yield the prior year of 1.7 bales to the acre (which would have given appellee 178 bales). The trial court found that this crop damage directly resulted from the lack of water which in turn resulted from the failure of the well. He found the amount of this loss to be \$12,500.00. (Tr.

38-39). Following a trial to the Court in May, 1956, that Court on November 23, 1956, ordered that judgment be entered for the plaintiff in the sum of \$35,106.40, and specifying that of this amount \$22,606.40 was for the cost of a new well and the balance, \$12,500.00, was for crop damage. (Tr. 28). On January 10, 1957, plaintiff's proposed findings of fact and conclusions of law were approved and adopted as the findings of fact and conclusions of law herein, (Tr. 33), and on the same date judgment in the amount of \$35,106.40 was entered in the docket of the District Court. (Tr. 40). Defendants' motion for a new trial was denied on March 1, 1957 (Tr. 49), and defendants filed their notice of appeal to this Court on March 22, 1957. (Tr. 49).

SUMMARY OF ARGUMENT

1. Plaintiff-appellee was the proper party to bring this action seeking to recover for defendant Shepard's fraudulent representation. (In Answer to Appellants' points 1 through 5, "Summary of Argument", Appellants' brief, page 17).

2. Plaintiff-appellee proved at the trial by clear and convincing evidence each of the nine necessary elements for a cause of action in fraud, and appellants' contentions in their brief to the contrary are simply a rehash of conflicting evidence with emphasis upon the testimony of appellants' witnesses which the trial court was in no respect required to believe. (In Answer to Appellants' points 6 and 7, "Summary of Argument", Appellants' brief, page 17).

3. The trial court applied the correct measure of damages, after having determined the existence of liability, and there is ample testimony to support the damages which it awarded. (In Answer to Appellants' point 8, "Summary of Argument", Appellants' brief, page 18).

4. The trial court was required to, and did, follow Arizona Substantive Law in deciding this case. (Point 9, "Summary of Argument", Appellants' brief, page 18).

1. Plaintiff's Standing to Sue for Fraud.

Appellants' argument under this head (Defendants' brief, pages 19-30) appears to be that since the fraudulent representations were made to Otto and Haas before the appellee Cal-Nine Farms, was incorporated, the latter cannot bring any action against Shepard for these fraudulent representations. Appellants apparently maintain that even the assignment from Otto and Haas to the corporation (plaintiff's Exhibit 8; Finding XVIII, Tr. 39), which specifically included the assignor's right to sue for fraud, does not transfer the right of action to the corporation, since a cause of action for fraud is not assignable.

Before discussing the authorities on this point, appellee desires to point out to the Court that if the corporation may not sue for fraud under these circumstances, quite clearly no one can. It was the corporation's money that was expended in reliance on the representation, and the corporation's property which was damaged as a result of the fraud. If appellants are correct, the individuals may not sue because they have not been damaged, and the corporation may not sue because the fraudulent representations were not made at a time when it was in existence.

The result of such a remarkable hiatus in the law would be an open season for the perpetrators of fraud at the expense of potential incorporators.

The Supreme Court of Arizona has never had occasion to pass on the point raised by appellants, but

the Supreme Court of California has done so in a case which squarely sustains the right of appellee to bring this action, even without an assignment.

In *Crystal Pier Amusement Company vs. Cannan*, 219 Cal. 184, 25 P. 2d 839, the Supreme Court of California held that a corporation *could* recover damages for fraud perpetrated upon its incorporators, prior to the existence of the corporation. There the officers of an existing corporation dealt with a contractor and employed him to erect an amusement pier. While the work was in progress, these same officers incorporated another corporation to hold title to the pier, and to construct a ballroom which was part of the same project. After the construction of the ballroom, the second corporation brought an action for fraud against the contractor based on representations made to the first corporation prior to the organization of the second corporation. The contention of the defendants, as summarized in the opinion of the Court, was that the second corporation had no cause of action because the representations were not made to it, and the first corporation had no cause of action because it did not build the ballroom. In rejecting such a contention, the Supreme Court of California stated:

“It would indeed be remarkable if the law proved so barren that legal principle could not be found to avoid such a result.”

25 P. 2d at 840.

The Court stated further that:

“It is, of course, obvious that the whole matter would have been settled by an express assignment

of the cause of action for fraud by the amusement company to the holding company. . . . ”

25 P. 2d at 840.

It went on to say that even without an assignment, the second corporation could maintain an action for fraud. It based its conclusion on the theory that in order for representations to be actionable, it is not necessary that they be made directly to the party seeking recovery. The Court said:

“A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly.”
(Citing cases).

25 P. 2d at 841.

The California Court cited two older cases from other jurisdictions, both of which are likewise square authority for recovery in the instant case. In *Iowa Economic Heater Company vs. American Economic Heater Company*, 32 Fed. 735, certain individuals had organized the plaintiff corporation in reliance upon representations by the defendant. The Court allowed the corporation to maintain action for fraud, overruling the contention that it had no standing because it was not in existence at the time the representations were made, saying:

“A corporation cannot be said to know anything except through its members or agents, and representations made to individuals, by reason of which such individuals are induced to form a corporation, may be said to be made to the corporation. The statements made were the moving cause of the organization of the corporation, and it was formed to act upon the information given to those who promoted its organization; and if this information was false and fraudulent, and the corporation was damaged thereby, it may have its action for such resulting damages.”

32 Fed. at 736.

In *Scholfield Gear and Pulley Company vs. Scholfield*, 71 Conn. 1, 40 Atl. 1046, the Court made the following statement in dealing with a similar factual situation:

“If, therefore, the defendant fraudulently told the five individuals named in the complaint what is there alleged, in order to induce them to form the plaintiff corporation, and procure the execution by it of the contract which was the subject of their negotiation with him, and if, thereupon, in reliance on his statements, they did the very things which his representations were designed to promote or secure, the fact that the last step—the execution of the contract—was, in form, the act of a party with which he never had any direct communication, cannot relieve him from responsibility for all the damages naturally resulting from his fraud. . . . It would have been an idle ceremony for these five men, after becoming the sole

shareholders and directors of the plaintiff, to recount to themselves, as such, the representations made to them as individuals, a few weeks before, in contemplation of their occupying this very position. Whatever had been thus said to them to influence the action of the projected corporation was, in legal effect, known to the corporation as soon as it was formed. . . . ”

40 Atl. at 1049.

The authorities just cited show that even without an assignment, appellee could maintain this action; and the *Crystal Pier* case states that had there been an assignment in that case, “it is obvious that the whole matter would have been settled”. Here there was an assignment from Otto and Haas to appellee (plaintiff’s Exhibit 8), and appellee’s right to maintain the action is clear.

One might think, to read the section of appellants’ brief devoted to this argument, that the cases there cited represent holdings contrary to the state and federal cases cited above. However, upon examination of these cases, it is apparent that not one of them deals with the precise question decided by the California, Connecticut, and Federal cases cited above. Instead, without exception, they deal with two entirely different questions: (a) Does an assignment or a transfer of a piece of property which does not specifically assign also a cause of action for fraud in connection with the property nevertheless pass with it by implication that cause of action? and (b) Is a cause of action for

fraud assignable to a third person who is a stranger to the transaction involving the fraud?

The very language quoted by appellant from the Arizona case of *Schwartz vs. Durham*, 52 Ariz. 256, 80 P. 2d 453, 456, upon which appellant so heavily relies, shows that it is dealing with the question of who, as between the transferor and transferee, may sue for fraud *when there is a contest as to this matter between the transferor and the transferee*. Both of the quotations from *Schwartz vs. Durham* on pages 19 and 20 make it clear that the thing the Supreme Court of Arizona was there deciding was whether or not the transfer of stock had carried with it the right of action by implication, or whether it did not pass with a general assignment of the property. No fair reading of *Schwartz vs. Durham* can extract more than that from it, and no serious contention can be made that such a rule in any way militates against the standing of plaintiff here. For here, as is apparent from the language of plaintiffs' Exhibit 8, the right to sue for fraud was expressly included in the assignment from Otto and Haas to appellee.

Appellants also argue against the effect of the assignment in this case on the grounds that Arizona law does not permit the assignment of a cause of action for fraud. (Appellants' brief, pages 23-27). Appellee first desires to point out that there are two major distinctions between the rule contended for by appellants and the facts of the instant case, and then to further point out that even the rule contended for by appel-

lants is totally unsupported in the cases decided by the Supreme Court of Arizona.

In the first place, if this Court believes that the correct rule, and the rule that would be followed by the Supreme Court of Arizona if that question were presented, is that laid down in the *Crystal Pier*, *Economic Heater*, and *Scholfield* cases, *supra*, then the question of assignment need never be reached. Each of those cases permitted the corporation to sue for fraud perpetrated upon its officers prior to the existence of the corporation, *without any assignment at all*. In the second place, appellants' statement of the rule against assignment of a cause of action for fraud is an abstract statement of such rule, which presumably deals with an assignment to a stranger to the transaction. No case is cited where the Court has refused to permit operation of an assignment in the circumstances of this case, where if the corporation is not permitted to sue for fraud, the perpetrator of the fraud will go scot-free.

But putting aside for a moment these important distinctions, even the Arizona cases upon which appellants rely, to support their general rule against assignment, suggest an opposite conclusion under the present circumstances. In *Deatsch vs. Fairfield*, 27 Ariz. 387, 233 P. 887, 891, the Supreme Court of Arizona stated the general proposition that the test of the assignability of a chose in action is whether it will survive and pass to the personal representative. In the later case of *United Verde Extension Mining Com-*

pany vs. Ralston, 37 Ariz. 554, 296 P. 262, the Supreme Court of Arizona had occasion to consider whether a tort action for damage to property (as opposed to personal injury) would survive. The Court there said, quoting from an earlier case decided by this Court:

“The Circuit Court of Appeals for the Ninth Circuit had before this identical question in *United Verde Copper Company vs. Jordan*, 14 F. 2nd 299, 301, and in disposing of it used the following language which is a correct statement of the law:

‘The next inquiry is whether plaintiffs, as assignees, could recover under the counts alleging damages to the properties of others. We think they could. In *Deatsch vs. Fairfield*, 27 Ariz. 387, 233 P. 887, 38 A.L.R. 651, the Court said that the question of survivorship of a chose in action is the test of assignability. Under paragraph 398, Ariz. Civil Code, suits for recovery of damages or for any injury or damage done to land may be instituted by executors, administrators, or guardians in like manner as they could have been by their testators or intestates. Paragraph 968, page 447, Arizona Civil Code, provides that executors or administrators may maintain action for trespass committed on real estate of the decedent in his lifetime. Our opinion is that by the statutes of the state a cause of action which arises from a tort to real property or injuries to a decedent’s estate, by which the value of the estate is lessened, survives, and that the general rule that such cause of action is capable of assignment obtains. (Citing Authority.)’ ”

The later Arizona case of *Employers Casualty Company vs. Moore*, 60 Ariz. 544, 142 P. 2nd 414, held that in this state an action for personal injury was not assignable. As suggested by the language of that case, "Rights of action for torts causing injuries which are strictly personal and which do not survive are not capable of being assigned". 142 P. 2nd at 415. The Court was there dealing with the type of action which the law had been most reluctant to permit to be assigned: a cause of action for purely personal injuries. The Arizona Court and this Court had both in previous cases held that a tort action for damage in property *did* survive and *was assignable*. None of these cases specifically involved an action for fraud, but certainly the cause of action in the instant case was one for damage to property, rather than personal injury, and should be governed by the *United Verde* rule rather than the *Employers Casualty* rule. Finally, it is clear under the law in force by statute in Arizona today that the cause of action for fraud would survive and be assignable. Section 14-477, A.R.S., which went into effect in 1955, provides as follows:

"Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium, or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefore . . ."

Though this statute was procedural, and would not retroactively revive a cause of action which had

abated prior to its passage, *Rodriquez vs. Terry*, 79 Ariz. 348, 290 P. 2nd 248, it certainly would permit assignment of the cause of action for fraud after its effective date. Plaintiffs' Exhibit 8, the assignment from Haas and Otto to appellee, has the effect of both ratifying prior assignments and presently assigning; at least as to the latter, which would be as of the date of May 17, 1956, the cause of action for fraud was assignable at the time it was done under the present Arizona law.

It need not be assumed that the Supreme Court of Arizona would not have reached the same result required by the 1955 statute in the absence of such an enactment. As pointed out in the above discussion of Arizona cases, the Supreme Court of Arizona has never passed on the specific question of whether a cause of action for fraud is assignable. Certainly the Arizona Court would give some weight to the statement in 76 A.L.R. 403, 408, written 25 years ago:

“The trend of decision under American statutes favors the survival of action and the causes of action *ex delicto* for fraud and deceit inducing the sale or purchase of property.”

In that annotation in support of the statement just quoted are cited cases from California, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, Oregon, Rhode Island, West Virginia and Wisconsin.

In summary, appellants' argument as to standing fails for each of the following reasons:

(a) On authority, appellants' brief wholly disregards the *Crystal Pier*, *Economic Heater* and *Scholfeld* cases which are squarely in point here, and against which there appears to be no countervailing authority. These cases hold that a corporation which suffers damage as a result of fraudulent representations made to its officers prior to the existence of the corporation may maintain an action for fraud against the perpetrator of the fraudulent misrepresentations. These cases were cited by appellee in its trial brief in the District Court, and in its opening brief to that Court following the trial of the case, and appellants' complete disregard of them can mean only that appellants cannot answer or distinguish their holding. The cases cited by appellant on this point, the leading one of which appears to be *Schwartz vs. Durham*, *supra*, deal with an entirely separate question: when there has been an assignment of property, without the assignment specifically mentioning any right to sue for fraud, and when a contest arises as to that right between the assignor and the assignee, who is the proper party to bring the action?

(b) On authority, the Supreme Court of Arizona has held that assignability of a cause of action depends upon whether or not the cause of action will survive. It has gone on to hold that a tort action for damages to property will survive, whereas a cause of action for personal injuries will not survive. Clearly, the instant fraud action is closer to an action in tort for damages to property than it is to a cause of action

for personal injury. Under statutory law in effect in Arizona on the date that plaintiffs' Exhibit 8, the assignment from Otto and Haas to Cal-Nine Farms, was executed, a cause of action for fraud is clearly assignable.

(c) On principle, the harsh and irrational rule contended for by appellants might, with its perverse logic, have appeal to the Medes and the Persians, but it ought not to commend itself to any Court in this day and age. Neatly bifurcating the cause of action so that the defrauded party was not damaged, and the damaged party was not defrauded, the rule would confer a previously unknown and presently unjustified immunity upon the perpetrators of fraud, without correspondingly benefiting any interests deserving of protection by the Courts.

Sufficiency of Evidence to Support the Findings of the Trial Court.

Appellants cite in their brief Arizona cases setting forth the nine elements which the Supreme Court of Arizona has held that a plaintiff must prove in order to sustain a cause of action for fraud. (Appellants' brief, page 31). Appellee accepts this statement of the Arizona law as being accurate, and respectfully refers this Court to a more recent case than those cited by appellants which appears to be the latest pronouncement of the Arizona Court on the subject. *Wilson vs. Byrd*, 79 Ariz. 302, 288 P. 2d 1079, 1081. Appellants apparently do not challenge the sufficiency

of the findings to support the judgment, but they do, in their extensive specifications of error and in their argument (Appellants' brief, pages 31-59), deny that appellee sustained its burden of proof on any one of these nine elements. In order that this argument may be responsive to that of appellants', appellee will discuss each of these nine elements in order.

Before dealing with testimony on specific issues, however, appellee wishes to briefly state the background in which this trial took place. Elmer Shepard, the defendant, was thirty-seven (37) years of age and had lived in Buckeye his entire life. (Tr. 159). He had been a farmer in the area for thirteen or fourteen years, (Tr. 159) and his father also farmed land in the area. (Tr. 74). When Shepard first purchased the land here in question in 1952, he was a pioneer in the Harquahala Valley, along with a few others: GORDON CAMERON, ED SWINDLE, RAYMOND BENSON, JIMMY HARRISON, and a couple of other farmers. (Tr. 185-186). Shepard had known Cameron ever since Cameron had come to Arizona, probably seven or eight or nine years (Tr. 186), and JULES TURNER, another Buckeye resident, had actually given an estimate of the output of Shepard's well. (Tr. 164). These settlers saw a great deal of each other while they were farming in the newly developed valley. (Tr. 185). Shepard was a good friend of all of them, by his own testimony (Tr. 186). All of them still resided in the Buckeye area at the time of the trial. (Tr. 186).

Otto, on the other hand, was a complete newcomer from California, having conducted his negotiations for the purchase of the land in a strange state, and taking up residence in Buckeye only in March, 1955. Haas, another shareholder in appellee, was never a resident of Arizona, and simply made occasional visits to the state from his home in Fresno, California.

In these circumstances, where the issue of the condition of the well on the Shepard property was being tried in Phoenix, thirty miles from Buckeye, it is more than passing strange that of all these people who were good friends of Shepard's, who were neighboring farmers undoubtedly acquainted with the condition of his well, and who were still residents of the Buckeye area, the only one of them called was Gordon Cameron—and he was called, not by Shepard, but by appellee. Shepard's witnesses, with one or two exceptions, claimed no intimate knowledge of the history of the well at all; they were either workers on Shepard's ranch, or sidekicks of Shepard's over a period of years (such as Ernest Wood). With such a background of Shepard's residence in the community for many years, in contrast with the recent arrival of Otto, the Trial Court was entitled to heavily weigh against defendant Shepard his failure to call these presumably responsible witnesses who would be acquainted with the condition of his well at the time in question.

A. Representation.

Shepard admitted that he told Otto: (i) that he thought the well was putting out 2200 gallons per minute; (ii) that the well would run 70 two inch tubes (Tr. 165). Otto testified that in addition Shepard represented that the well was in good condition (Tr. 89), that although Shepard said he had had a little trouble, "you really couldn't class it as trouble"; "the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he ended up by pulling the pump out of the hole, and found out everything was in good condition." (Tr. 90).

On the question of whether the representation as to good condition was ever made, it is interesting to note the contrast between Shepard's testimony in his deposition, taken over three months before trial, and his testimony at the trial:

Deposition:

(Tr. 73)

Q. Did you tell Mr. Otto and Mr. Haas that the well was in good condition?

A. (By Mr. Shepard) No, that was never brought up.

Trial:

(Tr. 165)

Q. And did you regard it as being in good condition at that time?

A: (By Mr. Shepard) Yes.

Q. Did you tell Mr. Otto and Mr. Haas it was?

A. They asked what condition it was, and I told them exactly what I'm telling you. . . .

The Trial Court was entitled to believe, and did believe (Finding IV, Tr. 34), that Shepard made each of these statements. The representation as to condition was certainly one of fact, and the fact that each of the other representations may have contained an element of opinion does not bar them from being representations.

Appellant cites not one case for his categorical statement (page 38 of his brief) that the lengthy conversation referred to between the parties could not be construed as anything more than the expression of an opinion. The law, both in Arizona and elsewhere, is to the contrary. The Supreme Court of Arizona in *Standard Insurance Agency vs. Northeast Rapid Transit Company*, 40 Ariz. 408, 12 P. 2nd 777, 780, approved the following statement from 6 Fletcher, Cyclopedia Corporation, paragraph 3868:

“As to the false representations of the value of the stock, it may be said that, as a general rule, statements as to the present or future value of corporation stock are mere matters of opinion, and do not constitute actionable fraud, although they may be false. But there is a well-recognized exception to this general rule. Where the party making the false representations as to the value of the stock has, or assumes to have, special knowledge

as to its value, and knows that the other party is ignorant of its value, and is relying upon his representations on the subject, the false representations will be regarded as of the statement of an existing fact and not mere opinion."

The *Restatement of Torts*, in section 525 thereof, states flatly:

"One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereof in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation."

The Supreme Court of Arizona has consistently held that it will follow the Restatement of the Law unless a different rule has been pronounced by the Court in prior decisions or by legislative enactment. *Ingalls vs. Neidlinger*, 70 Ariz. 40, 216 P. 2nd 387.

B. Falsity of Representation.

The question of whether or not the above representations were true or false was a sharply disputed one at the trial. Contrary to the impression which is gotten from reading appellants' treatment of this point in their brief (pages 38-45), the issue before this Court is not whether there was sufficient testimony to support a finding that the representations were *true*, but whether there was sufficient testimony to support a finding that the representations were *false*. Appel-

lants quote at length the statements of two of their own witnesses, and seize upon two fragments of Cameron's testimony which, in appellee's opinion, prove nothing one way or the other.

Shepard said that the well was in good condition, that he had had a little trouble "which you could hardly class as trouble," but that it was all taken care of now. In contrast to this bland assurance, Gordon Cameron, who was a longtime friend of Shepard's and was the well driller who drilled and later deepened the well in question for Shepard, made the following candid statement:

"Q: When you say you thought you could make a better well out of it, had there been trouble with the well?

A: Well, it never was a good well from the day it was drilled." (Tr. 191).

Q: Did you ever advise Mr. Shepard when he owned this well that he ought to drill a new well?

A: No.

Q: Did you ever tell him you thought he had a bad well?

A: I didn't have to tell him. We all knew it was pumping that silt and sand. We talked several times about if we ever did drill a new one, how we would do it." (Tr. 200).

As can be seen from the following excerpts from the testimony at the trial and on deposition (all of which the trial court was entitled to believe or disbelieve, as it chose), Shepard gave three different ver-

sions of the history of the well: *The first* was given to Otto and Haas at the time of their conversation in November, 1954; *the second* was given on his deposition; and *the third* was brought out on cross-examination at the trial.

Shepard in November, 1954:

According to Otto, testifying at the trial, Shepard told them he had had a little trouble which "you really couldn't class as trouble" when the pump had been pulled by mistake, and also stated without going into detail that the well had been deepened in December, 1954. (Tr. 90-91).

Shepard on Deposition:

"Q: (After having elicited answers regarding difficulty that Cameron had had in getting down into the well when he went in to deepen it in December, 1954). Was this the only time you had any trouble with the well, as opposed to the machinery?"

A: (By Mr. Shepard) The only trouble I had with the well. You couldn't classify that as trouble. He could have put a 9-inch bit in there as far as I was concerned. I just wanted the well deepened.

Q: There was no other occasion during the time between when you had the well drilled and the time you sold the land, that you had Gordon Cameron or any other well driller back?

A: No. The equipment was put back in. The crop was grown on the land, and a minute ago when

he mentioned that I used water from Gordon, it was ten days time, and they thought it was in the pump, and they pulled the pump, and it wasn't the pump, and they found it was the gas pressure on the engine, and it took about two turns with a screwdriver to put it back in shape.

Q. That was a different time than this deepening?

A: Yes.

Q: When was that, do you remember?

A: That was along in either July or August, I don't remember which.

Q: And you pulled the pump at that time?

A: Yes.

Q: And what again was the trouble?

A: The trouble was in the gas pressure on the engine. It was their mistake, but I paid for it.

Q: Who pulled the pump for you?

A: The State Tractor.

Q: It was during that time you used Gordon's water?

A: Yes; one of the times. One other time when we had some trouble—no; that was the time.

Q: So those were the only two times you had anything that might be called trouble either with the well or with the machinery?

A: Well, other than something minor with the engine—there was one time—or the pump. There was one time that . . . (the witness explained how he had had trouble with a nut on the engine)." (Tr. 59-61).

Thus, even after this lawsuit had been filed, Shepard in his testimony on deposition gave the distinct impression that the deepening had been uneventful, and that only troubles of the most minor and normal sort had been encountered in the history of the well. Only when he was confronted at the trial with the statements representing the enormous expenses he had incurred in attempting to repair the well did he admit to the true history of the well:

Shepard at the trial:

The pump had actually been pulled four times in less than two years, the bowls replaced twice, and over \$12,000.00 expended in an effort to salvage the well. (Finding 9, Tr. 36); (Tr. 169-176).

Even after Shepard admitted these tremendous expenditures, he denied that the well's output had ever decreased.

Testimony of Shepard at the trial:

"Q: And there was no decrease in the output of the well that caused you to have it gone back into?

A: Absolutely not.

.

Q: Then it is your statement, Mr. Shepard, that on none of these occasions when the pump was pulled was there any decrease in the output of the water that caused you to pull it?

A: Naturally, there could have been some decrease. It might not have been noticeable to the eye." (Tr. 178).

In these assertions, Shepard was flatly contradicted by VERN A. TOWER, called by the plaintiffs, who was a sales engineer for the State Tractor and Equipment Company, and who had frequently had occasion to service the Shepard well.

Testimony of Vern A. Tower at the trial:

“Q: Calling your attention to the summer of 1953, Mr. Tower, did you have occasion to pull a pump for Mr. Shepard then?

A: Yes; we pulled a pump, I believe it was—I’m not too familiar remembering dates, but I would say it was during August.

Q: This is the summer of 1953 that would have been about three or four months after the well was drilled.

A: Yes; we did.

Q: And do you remember the reason for pulling the pump at that time?

A: The bowls were worn badly.

Q: And did Mr. Shepard make any statement to you to that effect before it was pulled?

A: No.

Q: Do you remember if the output of the well had gone down?

A: *Yes; it had dropped off some.* (emphasis added).

Q: And what did you do at that time, Mr. Tower, to the bowls?

A: Replaced them with a different design bowl with different material in the bowls.

Q: What was the purpose for those newly designed bowls?

A: Trying to overcome the wear from abrasive material that the well was producing.

Q: That would be sand?

A: Sand, silt and sand.

Q: Did you have occasion to pull that pump again the next summer, in 1954, Mr. Tower?

A: Yes; I believe it was in 1954, sometime in the middle of the summer.

Q: And do you remember the reason for pulling it at that time?

A: The bowls were worn again.

Q: *And the output of the well declined?*

A: *It had dropped off. That is the reason we were trying to bring it back into capacity.*

Q: *Substantially?*

A: *Quite a lot; yes."* (Tr. 294-296) (emphasis added).

It was further developed in Mr. Tower's testimony that the last time the pump was pulled, in August, 1955 (four months before the conversation between Shepard, Otto, and Haas), Shepard, against the advice of State Tractor, had not replaced the worn bowls on the pump, but had simply had them re-machined.

Testimony of Vern Tower at the trial:

"Q: Mr. Tower, was that as satisfactory a remedy to the bowl condition as the replacement of the bowls would have been?

A: No. I would say that you could never in re-machining bowls build back the efficiency that the new bowls would have." (Tr. 296-297).

Finally, on the question of condition and history, there is the question of the proper conclusion to be drawn from Cameron's finding at the time he re-entered the well to deepen it in December, 1954. There is no doubt as to what actually happened, as appears from the testimony of Cameron, who testified with reference to the log sheet which had been kept under his supervision at the time of the drilling: The interior diameter of the casing was 16 inches; Cameron selected a 15 inch drill bit to sink into the existing well for the purpose of deepening it. At approximately 477 feet down, (the well prior to deepening had a depth of 1033 feet), the 15 inch bit hit something in the well and would not go further. The drillers removed the 15 inch bit and replaced it with a $12\frac{1}{4}$ inch bit, which was again sunk in the well. This smaller size bit failed to go past 458 feet. The smaller bit was in turn removed, and a drill collar of 10 inches in diameter was substituted. This still smaller diameter hit something at 458 feet. At this point, the 10 inch drill collar was removed, and an impression block was inserted into the well and removed, and the $12\frac{1}{4}$ inch bit was reinserted. This bit "drilled through bad place," and went on to the bottom. (Tr. 193-195).

Shepard, as noted above, did not regard this as serious; Cameron testified that he had no opinion as to what the cause of the obstruction was. (Tr. 195). Appellee called an expert well driller, Kenneth G. Brown, and presented this hypothetical situation to him. He gave the following opinion:

Testimony of Mr. Brown at the trial:

“Q: And what is your opinion?

A: My opinion would be that the well had collapsed at that point, the 455 foot point, and that when the bit was put back in and was rotated to go through that, it would, my opinion would be they would drill the side off of the obstruction at that point.

Q: You mean a side off the casing?

A: Off the casing, yes.

Q: That would leave a break?

A: An opening. (Tr. 231).

Thereupon Mr. Brown was asked what might be expected to happen to a well in this condition, and his answer took some three pages (Tr. 231-234). A fair summary of his testimony is that large particles of gravel and earth may enter the well shaft through the hole in the casing at 477 feet, and may eventually fill up the well: therefore, instead of having 1033 foot expanse to draw water from, the well will have less than 500 feet.

The falsity of the representation as to the output of the well and the number of tubes that the well would run is supported by the testimony of Otto and of Brown. Otto testified that when he took possession of the land, he discovered that the well would produce only enough water to run 55 two inch tubes into the furrows, and that he estimated the output of the well at that time (after he realized there was a flange welded in it) to be between 1300-1400 gallons a minute.

This was in March, 1955, some five months after the conversation between Otto, Haas, and Shepard. The well was never used during this period (testimony of Shepard Tr. 247). The witness Brown, who is an expert on wells, testified that generally the capacity of a well will be as good or better at the commencement of one growing season as it was at the conclusion of the prior growing season. (Tr. 238).

The concrete, particular testimony summarized above cannot be brushed aside by appellants' broadside citation of testimony either having no bearing on the issue or tending to favor them. It should not require citation of authority to establish the proposition that this Court sits, not to retry the facts, but to determine whether there is any substantial evidence to support the findings made by the District Court as trier of fact.

C. Materiality.

Apparently even appellants do not have the temerity to assert that the representations in this case were not material. It is difficult to imagine a more important inquiry from the point of view of a purchaser of desert land in the Harquahala Valley of Arizona than that of the capacity of a well on the property.

D. Speaker's Knowledge of Its Falsity or Ignorance of Its Truth.

On the basis of the discussion under the head of "falsity" above, the most that can be said in Shepard's favor on the instant point is that he spoke in reckless ignorance of the truth of what he was saying. This is sufficient under Arizona law. *Rice vs. Tissaw*, 57 Ariz. 230, 112 P. 2nd 866; *L. C. James Motor Company vs. Wetmore*, 36 Ariz. 382, 286 P. 180; *Restatement, Torts, Section 526, Comment C*. But it is also clear that the trial court was justified in going further, as it did, in finding that Shepard spoke with knowledge of the falsity of the representation. Shepard's remarkable three-stage transition, from conversation in 1954 to trial in 1956, regarding the history of the well, is pointed out above; his failure to call responsible witnesses who were still in the area and would be familiar with the condition of his well prior to its sale; repeated conflict between his testimony on deposition and his testimony at the trial; his contradiction by other disinterested witnesses, as in the case of Tower; his very evasive response to the subpoena *duces tecum* served upon him, and ordering him to bring with him to the trial records pertaining to expenditures on the well and pump (he brought with him statements totaling approximately \$1,000.00, and testified that he thought they were all the records pertaining to State Tractor and Equipment Company's services; thereupon, he was confronted with and forced to admit an additional four or five thousand dollars' worth of statements from

them which he had not produced); all of these factors more than justify the trial court in concluding that Shepard was a man who told the truth only when it suited his purposes, and that the afternoon of November 17, 1954, when he had the conversation with Haas and Otto, was a time at which it did not suit his purposes to tell the truth.

E. Intent that the Representation Should Be Acted Upon.

Appellants apparently misconstrued this requirement of law as the equivalent of proximate cause, since their argument under this heading goes to the question of whether or not Otto and Haas, on behalf of appellee, would have purchased the land regardless of whether Shepard had made any statement. Actually, what is involved under this requirements is not a question of proximate cause, but a question of intent on the part of the speaker: Did he intend that his representation should be acted upon? Certainly the Trial Court was justified in inferring such an intent on the part of Shepard at the time when by his own admission he knew Otto and Haas were interested in buying the land, he had quoted them a price on it, he knew that they were contemplating organizing a corporation to purchase it, and they made a trip to his ranch for the purpose of inspecting it and inquiring about the well. (Tr. 67).

F. The Hearer's Ignorance of Its Falsity.

An examination of appellants' contention in this regard in their brief discloses no separate argument on this point. (Tr. 51-52). The Trial Court found as follows:

"Neither Otto nor Haas, nor any other agent of the plaintiff at anytime prior to the execution of the agreement described below knew of the falsity of these representations." (Finding XIII, Tr. 37).

G. His Reliance Upon Its Truth.

Certainly, on the issue of the *fact* of reliance, as opposed to the *right to rely*, it is not unusual for a potential purchaser to rely on the statement by a potential seller. The following testimony of Otto supports the finding of the Trial Court on this issue:

"Q: Did you believe Mr. Shepard was telling the truth when he said the well put out 2200 gallons a minute?

A: Yes.

Q: And did you believe he was telling the truth when he said the well was in good condition?

A: Yes.

.

Q: If you had known there had actually been considerably more trouble, would you have bought the land at that price?

A: No." (Tr. 121-122).

Likewise, Henry Haas testified *on cross-examination*:

Q: You weren't relying on Mr. Shepard, were you?

A: When he talked to me and told me the well was in good shape, I certainly did. (Tr. 274).

Belying the fatuous suggestion of appellants that Otto and Haas relied upon all the neighbors, but not upon Shepard, is the following testimony of Haas on cross-examination:

Q: Did Mr. Otto ever advise you he had talked to Woody about the water supply?

A: He told me he had talked to people around the neighborhood about the condition of the place.

Q: What did he tell you he had discovered about the water supply?

A: He told me it sounded all right to him, but it seemed like he just couldn't get to the bottom of it.

Q: Did he suspect there was something the matter with the water supply?

A: Well, not exactly, but nobody would exactly commit himself. I don't know. (Tr. 277).

In short, the neighbors' statements, while not derogatory, had been sufficiently vague to make Otto want to put the questions regarding the well to the one man who would certainly know the answers: Elmer Shepard, the owner of the property.

Appellants contend that under these circumstances as a matter of law, Otto had no right to rely upon Shepard's representations, because Otto himself had an opportunity to inspect the property. In support of this position, they cite the two Arizona cases of *Law vs. Sidney*, 47 Ariz. 1, 53 P. 2nd 64, and *Springer vs. Bank of Douglas*, Ariz., 313 P. 2nd 399.

In *Law vs. Sidney*, the plaintiff was a woman of mature years, fully competent to transact business independently. The representation was made to her by the defendant that before she invested her money with him, a bond guaranteeing its return would be placed in a bank in the city where she resided. Defendant never actually represented to her that a bond actually had been so posted. The plaintiff gave her money to the defendant without ever making inquiry of the bank as to whether a bond had been posted. It was under these circumstances, feeling that the least the plaintiff could have done was to make inquiry at the bank, that the Supreme Court of Arizona used the language quoted on page 58 of appellants' brief. In *Springer vs. Bank of Douglas*, *supra*, the plaintiff was a customer of the bank, who counterclaimed against it for damages suffered as a result of fraudulent representations made by a bank officer. The claimed representations were a statement by the officer to plaintiff that one Davis, whom plaintiff had known for four months and done business with, would prove to be a satisfactory business partner. The Supreme Court of Arizona, in holding that the statement of the bank officer was a mere statement of opinion about which plaintiff had

an equally good knowledge, held that the counterclaim failed to state a claim for relief.

However, in the *Springer* case, after using the language quoted by appellants at page 58 of their brief, the Supreme Court of Arizona made the following statement which appellants have not seen fit to quote:

“There is authority for founding fraud upon opinion statements, as where it is not open to both to make examination and inquiries or fair investigation is prevented or there is an inducement not to make investigation. The facts herein do not present any such situation.” 313 P. 2nd at 402.

In *Perkins vs. Gross*, 26 Ariz. 219, 224 P. 620, the Supreme Court of Arizona did permit a party who had made an investigation of a house which she contemplated purchasing to recover for fraudulent representations as to the house. The Court there stated:

“Such examination as was made was merely superficial and cursory, and did not assume to be full or complete. The defects were hidden and not readily discernible.” 224 P. at 621.

The testimony in the instant case will support a finding of the following facts, any one of which is sufficient under the above quoted language from the recent *Springer* case decided by the Supreme Court of Arizona: (i) It was not open to both parties to make examination and inquiries of the well, since Otto's testimony was to the effect that it would have cost \$1500.00

to simply have the pump pulled out of the well. (ii) Fair investigation of the well and pump was prevented by the baffle which had been welded into the spout, and which according to Otto's testimony gave the appearance of a greater flow from the spout than was actually being produced. (iii) Shepard induced Otto not to make an investigation, in that Otto's inquiry about the muddy character of the water which he saw was brushed aside by Shepard with the statement that all wells in the area did that for the first few minutes. (Tr. 89; Tr. 267).

Appellee wishes to add a final word on the question of the right to rely in a fraud action. *Restatement, Torts*, Section 540, takes the flat position that in a business transaction, the recipient of a fraudulent misrepresentation is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation. This statement has been approved in well considered cases, e.g., *Bishop vs. Strout Realty Agency*, 4th Cir. 182 Fed. 2nd 503, 505. According to the Restatement, only when it is clear that the decision to enter the transaction was not caused by the buyer's belief in the truth of the representation, but instead by the buyer's independent investigation alone, is the seller relieved of liability for misrepresentation as a matter of law. *Restatement of Torts*, Section 547. It is unnecessary to go this far to uphold the plaintiff's right to rely in the instant case, but these sections, unusually authoritative in Arizona, make it unthinkable that the Supreme

Court of Arizona, if faced with this case, would hold in accord with appellants' contentions.

H. Proximate Injury.

Appellee has endeavored to show that Otto and Haas did in fact rely upon the representations made to them by Shepard. If this be the case, it does not seem arguable that the damage to the well, and to the crop as a result of the well's failure, were not proximately caused by these representations. Appellants do not appear to contend otherwise. (see page 59 Appellants' brief).

DAMAGES

Appellee's discussion of the issue of damages will cover the following points: (a) The proper measure of damages in this action; (b) The correct application of the proper measure of damages to the facts of this case; (c) Appellants' claim of erroneous exclusion of testimony regarding damages.

(a) Measure of damages.

The Supreme Court of Arizona applies the so-called "Benefit of the Bargain" rule for ascertaining damages in fraud cases, and has indicated that it considers this rule to be the more liberal one. *Lutfy vs. R. D. Roper & Sons Motor Company*, 57 Ariz. 495, 115 P. 2nd 161, 165. Appellants do not appear to dispute this proposition (Appellants' brief, page 61), and there-

fore the dispute turns about how that rule should be applied to the facts of this case.

On principle, the benefit of the bargain rule is defined as the difference between the value which the property would have had had it been as represented, and the value which it in fact has. *Lutfy vs. R. D. Roper & Sons, supra; Curry vs. Windsor*, 22 Ariz. 108, 194 P. 958. Here, the plaintiffs' claim was that the fraudulent representations related to the well on the property, and represented it to be in good condition when in fact it was worthless. Logically, then, the benefit of the bargain rule should entitle them to recover the difference between the value of the land with a good well on it, and the value of the land with a worthless well on it. Perhaps it would be possible to prove these two values by a parade of expert witnesses, but surely an acceptable short-cut in this regard is to simply determine the cost, on this particular property, of drilling a well which would measure up to the representations made by the seller. Certainly the result in either case would be the same: Where the well is a necessary element to make the land worth anything, the value of the land without a well or with a worthless well will be less than the value of the land with a good well by precisely the amount of money which is required to install a good well on the land.

As might be expected, the authorities sustain the logic of this application. In *Nunn vs. Howard*, 216 Ky. 685, 288 SW 678, the Kentucky Court of Appeals held that where a polluted well was falsely represented to

give good water, the measure of damages was the cost of drilling a well which did give good water. Kentucky follows the same "Benefit of the Bargain" rule, as does Arizona, in fraud cases. *Gregory vs. Forester*, 228 Ky. 201, 14 SW 2nd 755. Likewise, *McCormick on Damages*, 1935, contains the following black-letter summary of the law, which supports this application:

"Under the rule which measures the damage by the difference between actual value and value as represented, an alternative measure of recovery is the reasonable cost of placing the property received in the condition in which it was represented to be." *McCormick*, Sec. 122, P. 454.

These authorities give every reason to believe that the Supreme Court of Arizona, if confronted with this precise question, would reach the same result; and appellants have cited no authority whatever which would indicate the contrary.

Just as surely, where the injury to the cotton crop due to the lack of water is a proximate consequence of the failure of the well, appellee is entitled to its loss on the crop as well as for damages to the well. In a case indistinguishable from the present one, where land was sold with the representation that there was an adequate supply of water to irrigate it, the Supreme Court of Montana held that the buyer could recover as damages the first year's crop loss resulting from that misrepresentation. *Healy vs. Ginoff*, 69 Mont. 116, 220 Pac. 539.

Restatement of Torts, Section 549, reads as follows:

“The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages under the rule stated in Section 525 is the pecuniary loss which results from the falsity of the matter misrepresented, including . . . (b) pecuniary loss suffered otherwise as a consequence of the recipient’s reliance upon the truth of the representation.”

In the text following the quoted section, illustration 3, page 114, *Restatement, Torts*, Volume 3, is as follows:

“3. A sells to B, f.o.b. Detroit, a machine which he fraudulently misrepresents to be of great value in the manufacture of B’s product. B pays the freight of the machine to his factory and expends money in preparing for its installation. On the arrival of the machine the falsity of the representation is discovered and the machine is found to be useless for the purpose for which it was bought. B is entitled to recover, as special damages, the freight which he has paid and the expense which he has incurred in the installation of the machine, *as well as for harm done to his raw material by the machine before its uselessness was discovered.*” (emphasis added).

Thus the Restatement (which, it bears repeating, is of peculiar force in Arizona where the particular point is undecided by the Supreme Court of the State, *Ingalls vs. Neidlinger, supra*), squarely supports the

allowance for damages to the crop under these circumstances.

(b) Application of these facts.

The Trial Court allowed the full amount spent for the new well as an element of damages. Appellants apparently do not attack these elements as such, but appellee takes the liberty of summarizing the contents of the three exhibits which evidence these expenses:

Plaintiffs' Exhibit No. 3: Cameron's bill for drilling well in the amount of	\$17,541.73
Plaintiffs' Exhibit No. 4: Arizona Engine & Pump Company bill for removing and replacing the pump and machinery in the amount of	3,304.00
Plaintiffs' Exhibit No. 5: Joe Connelly's bill for furnishing of well rock in the amount of	1,760.67
	<hr/>
	\$22,606.40

Gordon Cameron, the man who drilled the new well, testified that he had done no more in the way of depth or casing than was necessary for a good well on the property (Tr. 199). No claim is or could be made that the other services were not necessary, and they are all proper items of damage.

As to the damage to the crop, the computation of a figure admittedly presents more difficulty than does the cost of the well. In a case decided September 30,

1957, and not yet reported in the Advance Sheets, the Supreme Court of Arizona made the following observation about damages for crop loss:

“Damages of this character are not subject to exact proof. Many factors influence productive results. If the jury’s computation is reasonably within the range of the evidence bearing thereon, the Court will not disturb it.” *Pacific Guano Company vs. Ellis*, No. 6183, Supreme Court of Arizona.

Similarly, the Court of Appeals for the Eighth Circuit has laid down the following rule:

“Where a crop is injured from time to time throughout its growing season until its maturity by sulphurous fumes and their products, but is not destroyed, so that it is cultivated throughout the season, harvested, and marketed, the damage to it may be lawfully measured under these rules by the difference between the value and maturity of the probable crop if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.” 236 F. 510, 513.

United States Smelting Co. vs. Sisam, 8th Cir., 193 F. 293, (Headnote, Syllabus by the Court); approved *verbatim* in *American S & R Co. vs. Riverside Dairy*, 8th Cir., 236 F. 510, 513.

The *Riverside* case was quoted with approval by this Court in *United Verde Copper Company vs. Jor-*

dan, 9th Cir., 14 Fed. 2nd 299. Otto testified that he received in cash from the gin the amount of \$16,975.21, for a crop of 116 bales from 105 acres. He also testified that as of June 1, given adequate water, his crop would have amounted to $2\frac{1}{4}$ bales per acre, or a total of 236 bales from the same acreage. Gordon Cameron, farming next-door to Otto, made $2\frac{1}{2}$ bales per acre that year. Elmer Shepard, farming the identical land the previous year, made 1-7/10 bale to the acre. (Haas, on cross-examination, testified that Wood told him Shepard's farm "just wasn't run right." Tr. 277).

Without even considering the loss of staple length which resulted from the lack of water, and which plaintiff had by Exhibits 12 and 17 in the Trial Court correlated with the government loan price, the Trial Court could have concluded that Otto, an experienced cotton farmer, would have raised two bales of cotton to the acre, which would have given him an increased gross income from the crop in excess of \$13,500.00 (two bales to the acre would mean a total crop of 210 bales, which, on the basis of the \$16,975.21 that Otto received from his actual crop, would have given a total gross income in excess of \$30,500.00).

Contrary to appellants' assertion on page 62 of their brief, appellee did make a showing in the Trial Court as to the expense of producing, harvesting, and marketing the probable crop which was not realized. Otto testified that he would have picked all the cotton himself, regardless how large the yield was (Tr. 120), and that no more money would have gone into cultiva-

tion if the crop had been larger. (Tr. 360). He further stated that the only added expense he could think of in connection with a larger crop would have been the cost of hauling additional cotton to the gin; this cost he estimated to be about $\frac{1}{4}$ cent a pound, and further estimated that 1400 pounds must be taken to the gin in order to get a bale of cotton. (Tr. 361). This would figure out to be \$3.50 hauling charges for each bale of cotton, and, if two bales to the acre were to be realized, the additional hauling charges would be $\$3.50 \times 94$ bales, or around \$330.00. Subtracting this figure from the added gross income (in excess of \$13,500.00) which the added crop would have produced, the result is slightly more than \$13,000.00.

In awarding appellee \$12,500.00 damages for crop loss, it is quite obvious that the Trial Court resolved every doubt in favor of appellants and against appellee, and awarded to appellee the lowest possible computation of its loss. Certainly appellants may not complain of this.

Passing mention must be made of the contention (on page 62 of Appellants' brief) that appellee failed to prove it was necessary to drill a new well, citing Cameron's testimony at Tr., pages 211, 224-226. This argument verges upon the cynical; Cameron's testimony was that, although repair of the bowls would have made the well produce water, the bowls would have been constantly worn down by the sand coming into the well, and that since each time the bowls were replaced it cost \$2,000.00, it was simply not economical-

ly feasible to attempt to merely replace the bowls. See, in addition to the pages cited by appellants, Tr. 227.

(c) Exclusion of Cameron's Testimony.

Appellants (at pages 62-63 of their brief) complained of a ruling of the Trial Court excluding an answer of the witness, Cameron, to a question propounded by appellants' counsel. This Court need not consider appellants' contention in this regard, since it was not contained in the specifications of error in the brief, *Thiel vs. Southern Pacific Company*, 9th Cir., 169 Fed. 2nd 30, 32, nor was it even mentioned in the statement of points to be relied upon. *Williams vs. Dodds*, 9th Cir., 163 Fed. 2nd 724, 725.

If this Court desires to consider the point on the merits, an examination of the colloquy contained in the record, (Tr. 217-218) indicates that Cameron was being asked his opinion as to the value of the land at the time appellee purchased it. Such a question and answer by itself, however, would be quite immaterial to the issues of this case; appellee was suing, not on the grounds that the value of the land had been misrepresented to him, or that he had been led to believe that the land was worth more or less than the \$80,000.00 he paid for it, but rather on the ground that the condition of the well had been misrepresented to him. No

matter what answer Cameron would have given to this question, it could not have helped appellants. Even if he had been of the view that the land was worth \$150,000.00 at the time appellee purchased it for \$80,000.00, nonetheless, if the condition of the well on it had been misrepresented and appellee was damaged thereby, appellee was entitled to recover. It was the misrepresentation as to the condition of the well upon which appellee's claim was grounded, and he is entitled to be made whole for his reliance. *Curry vs. Windsor*, 22 Ariz. 108, 194 Pac. 958.

Finally, appellants made no offer of proof whatsoever as to what Cameron's answer would have been, nor did they include in their motion for new trial any affidavit or statement as to what the answer would have been. As stated at 4 C.J.S. 580 (Appeal in Error), Section 291 (b) :

“Subject to certain exceptions, a proper offer of the evidence excluded is usually necessary to save an objection to its exclusion for review.”

This Court has so held, *Sacramento Suburban Fruit Lands Company vs. Miller*, 9th Cir., 36 Fed. 2nd 922, and so has the Supreme Court of Arizona, *Woodmen of the World Life Insurance Society vs. Velasquez*, 60 Ariz. 457, 139 Pac. 2nd 766. The rule applies to testimony elicited on cross-examination as well as to that elicited on direct examination. *State vs. Poolos*, 241 NC 382, 85 SE 2nd 342. In the absence of such an offer of proof, even if appellants' theory of admissibility is correct (which appellee denies), it is impossi-

ble for appellants to show that they have been harmed by the exclusion. Indeed, the only other evidence in the record touching on the question of Cameron's opinion as to the value of the land indicates that his opinion was based on an offer he made to Otto as president of appellee to purchase the property, and incidentally indicates that the Trial Court received the benefit of Cameron's opinion through appellants' cross-examination of Otto. (Tr. 367). Otto at this point testified that Cameron offered to buy the land for what appellee had in it after the new producing well had been brought in, but that before that Cameron had stated he would not pay the price of desert land for it. (Tr. 367).

In summary, the point is not properly raised in this Court; it was not properly preserved in the District Court; the action of the District Court in excluding the testimony was not erroneous; and in any event, appellants cannot show they were harmed by the exclusion. Any one of these reasons is sufficient for over-ruling appellants' charge of error in this regard.

CONCLUSION

Appellants have made an elaborate legal argument as to the standing of appellee to maintain this suit; appellee has endeavored to show that this argument is utterly without support in any of the authorities, and has nothing to commend it by way of principle. The remainder of appellants' brief is an attack on factual findings of the District Court; an attack conducted by means of excerpting from the testimony of witnesses called by the defendant or colorless passages of testimony from the appellee's witnesses, and ignoring the crucial testimony supporting the appellee's position upon which the District Court was entitled to base its findings. Appellants' efforts to press upon this Court the job of retrying the issue of facts that were already tried by the District Court falls far short of showing that the findings of the District Court were clearly erroneous. The case was fully and fairly tried by an experienced and able trial judge, and the result reached was eminently just. The judgment should be affirmed.

Respectfully submitted,

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IN THE
United States
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For the Ninth Circuit

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his wife,

Appellants,

vs.

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Appellee.

APPELLANTS' PETITION FOR REHEARING

KRAMER, ROCHE & PERRY
and F. HAZE BURCH

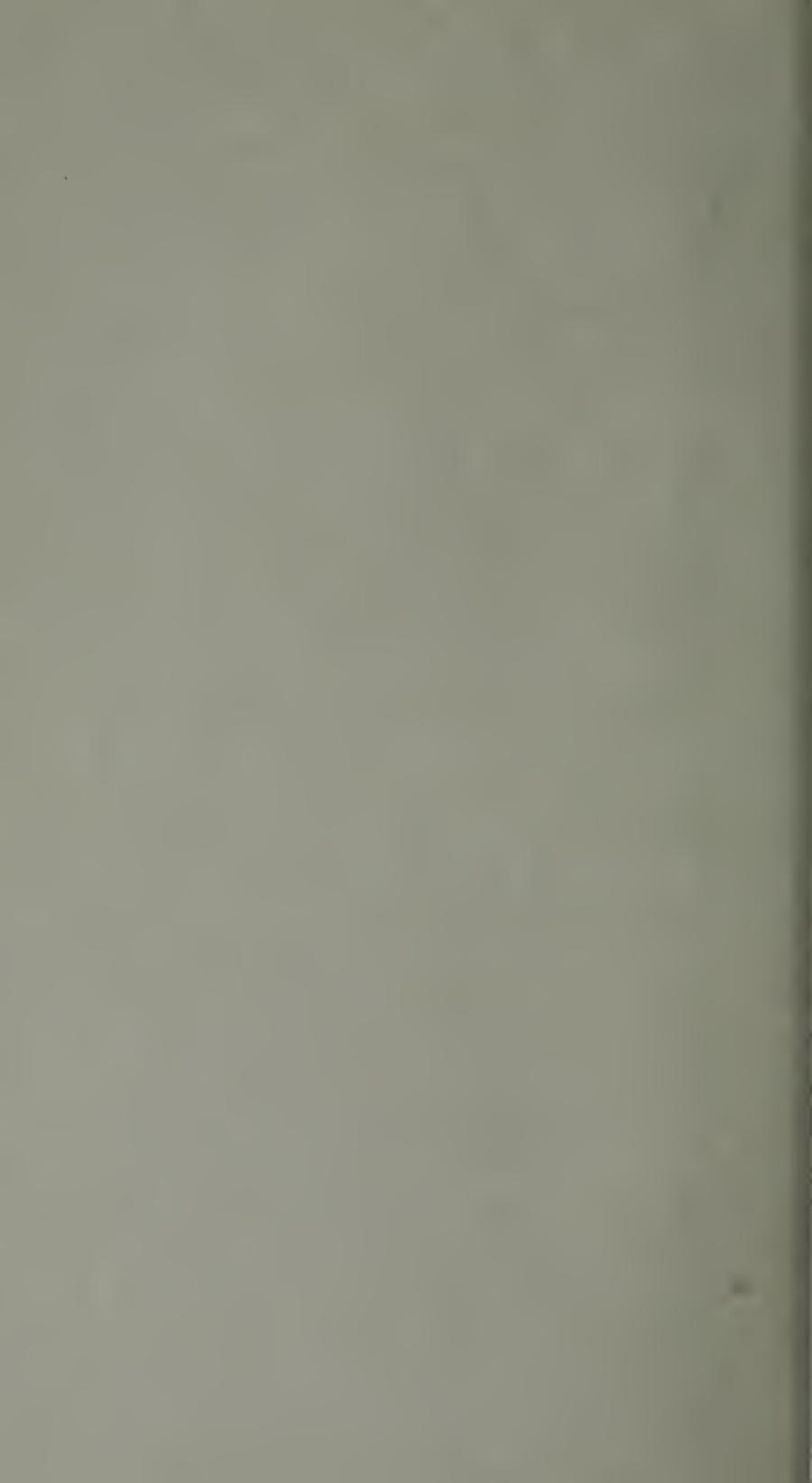
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FEB 27 1958



SUBJECT INDEX

	Page
Grounds for Rehearing	1
Argument	3
I. The Value of Land Under the "Benefit of Bargain" Rule can only be Determined by Direct Testimony	3
11. The Purpose of the "Benefit of Bargain" Rule is to Require the Seller in a Case of Fraud to Make Good his Representations	5
III. The Value of the Property Sold is a Necessary Element in Arriving at Damages Suffered Under the Arizona "Benefit of Bargain" Rule and Failure to Produce that Value and Prove it in Court is Error	7
IV. The Value of Land Under the "Benefit of Bargain" Rule can Only be Determined by Direct Testimony. Costs of Drilling a New Well have no Relationship to Land Value	8
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases:	Pages
Lutfy v. R. D. Roper and Sons, 57 Ariz. 495, 115 P. (2d) 161	2, 7, 8, 9
Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319	2, 4, 5
Erie R. Co. v. Thompkins, 1938, 304 U.S. 64, 82 Law Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487	2
New York Life Insurance Co. v. Rogers, 126 Fed (2d) 784 (C.C.A. Ariz.).....	2
Curry v. Windsor, 22 Ariz. 108, 194 P. 958	5, 8
Ren v. Jones, 38 Ariz. 476, 1 P. (2d) 110	6, 7, 8
Hidalgo v. McCauley, 50 Ariz. 178, 70 P. (2d) 443....	8

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To the Honorable William Healy, Walter L. Pope and
Dal M. Lemmon, Judges of the United States Court
of Appeals for the Ninth Circuit:

Appellants respectfully petition for a rehearing in
the above cause to the end that the Judgment of this
Court affirming the judgment of the District Court
be vacated and the judgment of the lower Court re-
versed.

GROUND FOR REHEARING

Appellants respectfully urge that the opinion and
judgment are erroneous and contrary to law, and that
a rehearing should be granted for the following four
reasons:

1. The Court has incorrectly assumed that since
there was evidence sufficient to support the need for
and the cost of the new well, and also evidence to sup-

port the award for crop damage, the “benefit of bargain rule” as followed by the Arizona Supreme Court, has been met. The Court has failed to consider that the Appellants were precluded from showing a different amount of damages by the ruling, when the case law of Arizona specifically reserves to appellants that right as set forth in the case of *Lutfy vs. R. D. Roper and Sons*, 57 Ariz. 495, 115 P. (2d) 161.

2. The Court erroneously assumes that had appellants been allowed to produce testimony relating to the value of the land that damages would not have been materially different. This assumption is in direct conflict with the decision of the Arizona Supreme Court in the case of *Wooley vs. Locarnini*, 18 Ariz. 539, 164 P. 319, and again precludes the appellants from having their day in Court to actually prove the difference in damage.

3. The Court has erroneously assumed that the District Court has the right to take a “short-cut” in the law and avoid a strict conformance with the case law of the State of Arizona, as promulgated by the Arizona Supreme Court. Such a determination violates the doctrine laid down by the United States Supreme Court in *Erie R. Co. vs. Tompkins*, 1938, 304 U.S. 64, 82 Law Ed. 1188, 58 Sup Ct. 817, 114 A.L.R. 1487, and affirmed by this Court in *New York Life Insurance Co. vs. Rogers*, 126 Fed (2d) 784 (C.C.A. Ariz.)

4. The Court has failed to consider that under its ruling the appellants are forced to accept the appellee’s statements as to the damages and are prevented from producing evidence rebutting or contradicting appellee’s position. Appellants contend that if appellee is entitled to the benefits of an extremely liberal interpretation of the Arizona “benefit of bargain” rule on

damages, then appellants have the right to produce evidence in strict compliance with said rule, and under the Court's ruling this right has been denied them.

ARGUMENT

THE VALUE OF LAND UNDER THE "BENEFIT OF BARGAIN" RULE CAN ONLY BE DETERMINED BY DIRECT TESTIMONY

Costs of drilling a new well have no actual relationship to land value that can be determined by the Court. The District Court and the Court of Appeals have both "assumed" that the cost of a new well indicated the reasonable depreciated value of the land sold. Appellants wish to point out, however, that the Court fails to consider the obvious fact that desert land known to have water available underneath it certainly has a different value from desert land not known to have water beneath it. This is the reason that direct testimony is necessary under the Arizona Benefit of Bargain rule, as to the value of the land as it actually was, and the value as it was represented to be. A perusal of the transcript of the proceedings in the District Court will reveal that the appellants attempted to elicit information as to the actual value of the land from the Appellees' own witnesses, and were precluded by doing so by ruling of the Court (Tr. pages 217-218). The Court, in accepting testimony, only as to the cost of drilling a new well, deprived the Appellants of any possibility of showing a different measure of damages. Thus, even though desert land with water under it may have a different value from desert land that is undeveloped with no known water supply, this evidence was not available to the Court, nor were Appellants given the opportunity to prove such a condition, if, in fact, it does exist. Appellants made every effort

to produce this type of information, but the Court's ruling summarily precluded any further showing of this nature, as indicated by the transcript sections cited above.

The Court is referred to the first Arizona case setting forth the Arizona Supreme Court's ruling on the Benefit of Bargain rule of damages which is *Wooley vs. Locarnini*, 18 Ariz. 539, 164 P. 319. In this case, which involved an allegation of fraud in the sale of land, the Arizona Supreme Court states as follows, at 18 Ariz. page 548:

"Whether the land was of a value less than the purchase price was the issue on trial. If found to be of a less value, then the measure of damages was the difference between the actual value as found and the actual value it was represented to be as represented by the purchase price paid for the land. This is the rule the jury were instructed to follow, and is the correct rule of damages under the pleadings in this case."

In this same case the Supreme Court found on page 550 that the jury determined that fifteen acres of the land sold was worthless, but that sixty-five acres of the land sold was, in fact, worth more than the purchase price, and the Court further states that the seller was entitled to a credit for the value that this sixty-five acres of land had over and above the purchase price per acre. The record in the Court below is totally devoid of any indication that the value of the land purchased by the buyers was the purchase price of \$80,000.00, less the costs of drilling a new well. The record is totally devoid below of any indication as to the actual value of the land. The reason for this void in the testimony is, in Appellants' opinion, directly attributable to the ruling of the Court which Appellant has set forth as error.

II.

THE PURPOSE OF THE "BENEFIT OF BARGAIN" RULE IS TO REQUIRE THE SELLER IN A CASE OF FRAUD TO MAKE GOOD HIS REPRESENTATIONS.

In the case of *Curry vs. Windsor*, 22 Ariz. 108, 194 P. 958, the Arizona Supreme Court states as follows:

"The only reasonable construction we are able to place upon the pleadings is that the cross-complaint constitutes an action on the case for deceit. If we are correct in this conclusion, then the true rule of damages in case of a verdict for *Windsor* is the difference between the actual value of the lots he received and their value if the alleged fact regarding them had been true. *Curry* is to make good his representations of fact as though he had given a warranty to that effect. *This rule makes recovery exactly commensurate with the injury.*" *Curry vs. Windsor*, 22 Ariz. at page 111.

Appellants contend that the ruling of the District Court prohibiting Appellants in the trial below from producing testimony as to the actual value of the land prevents a determination of damages "exactly commensurate with the injury." To assume that the value of the land was depreciated exactly in the amount of the cost of drilling a new well, without considering whether or not the land sold actually had a greater value than represented, as was considered in the case of *Wooley vs. Locarnini*, cited above, is error under the Arizona rule.

It is additionally pointed out to the Court that the cost of drilling the new well was based upon the condition of the well almost one year after the sale, when, according to the testimony in the Court below, the Cal-Nine Corporation, through its officer, Otto, determined

that the existing well was of no value. (See TR. page 144.)

The Court is referred to the case of *Ren vs. Jones*, 38 Ariz. 476, 1 P. (2d) 110, which was a case involving fraud in the sale of an automobile. The "Benefit of Bargain" rule was applied in this case, and the Supreme Court of the State of Arizona states as follows:

"The important inquiry was its condition at the time of sale, for the measure of damages was the difference between the actual value of the car at that time and its value as represented by Appellant." *Ren vs. Jones*, 38 Ariz. at page 479 (Emphasis supplied).

The ruling of the District Court on the "Benefit of Bargain" rule violates this principle as set forth by the Arizona Supreme Court, because it was the District Court's ruling that the cost of drilling a new well many months after the time of sale was the basis for damages. As indicated in each of the Arizona cases heretofore cited to the Court, the correct rule was the difference between the actual value of the land *at the time of sale, and the value as represented by the Appellant at that time*. The record is void of any evidence of this nature as required by the Arizona Supreme Court rule.

III.

THE VALUE OF THE PROPERTY SOLD IS A NECESSARY ELEMENT IN ARRIVING AT DAMAGES SUFFERED UNDER THE ARIZONA "BENEFIT OF BARGAIN" RULE AND FAILURE TO PRODUCE THAT VALUE AND PROVE IT IN COURT IS ERROR.

In the case of *Lufty vs. Roper*, 57 Ariz. 495, 115 P. (2d) 161, the Supreme Court held that the plaintiff's damage in a case involving fraud in the sale of an automobile under the benefit of bargain rule, was the difference in value between the car he bought and the one he wanted and was told by the seller he was getting, but did not. The Court held that the trade-in value of the automobile purchased was inadmissible, even for impeachment purposes. The basis of the Court's ruling as indicated above was founded upon the proposition that such testimony did not relate to the value as represented and the actual value at the time of sale. *Lufty vs. Roper*, 57 Ariz. at page 505.

Referring the Court again to the case of *Ren vs. Jones*, cited above, the Arizona Supreme Court in this case affirmed a ruling of the Superior Court denying a party litigant the right to examine a motor vehicle, and to testify as to its present value, the Court stating:

"The important inquiry was its condition at the time of sale, - - -." *Ren vs. Jones*, 38 Ariz. at page 479.

Appellants contend the plaintiffs below failed to show any evidence as to the actual value of the land sold at the time of sale, and that this failure to follow the Arizona rule was reversible error.

IV.

THE VALUE OF LAND UNDER THE "BENEFIT OF BARGAIN" RULE CAN ONLY BE DETERMINED BY DIRECT TESTIMONY. COSTS OF DRILLING A NEW WELL HAVE NO RELATIONSHIP TO LAND VALUE.

Appellants contend that a reasonable interpretation of the rulings set forth by the Arizona Supreme Court in the *Lufty* case, the *Ren* case, and the *Curry* case, cited above, restrict testimony as to damages in fraud cases to evidence of actual value of the property sold *at the time of sale*, and evidence as to the representations as to value.

The Arizona Supreme Court in its rulings in the *Lufty* case and the *Ren* case has twice indicated that the cost of repairs, replacements, etc., have no value in determining damages in fraud cases. As the Court stated in the case of *Hidalgo vs. McCauley*, 50 Ariz. 178, 70 P. (2d) 443, in a case involving fraud in the sale of stock:

"If the only action was on account of Shreve's fraudulent representations to the plaintiff as to the value of the stock which they accepted the damages would be the difference between what the stock was actually worth *at the time they got it and what Shreve had represented it to be worth*. *Hidalgo vs. McCauley*, 50 Ariz. at page 185. (Emphasis supplied)

By restricting testimony in the District Court to plaintiff's evidence as to the cost of repairs the Court, in effect, prevented defendants therein and Appellants here from presenting evidence as to the actual value of land sold at the time of sale. In other words, the District

Court by its ruling required Appellants to accept the cost of repairs as the only evidence in relation to damages and although such evidence might have been of some value under the most liberal interpretation under the Arizona Benefit of Bargain rule, the Court's ruling that Appellants could not introduce evidence in strict conformity with the Arizona Rule (TR 217-218) deprived them of a right reserved to them under the rules of damages as promulgated by the Arizona Supreme Court.

CONCLUSION

The problems presented by this case were numerous and counsel appreciates that long and careful consideration was given the matter before a decision was reached. Appellants believe, however, that the decision of this Court is founded on an assumption that the value of the land sold by Appellants Shepard was the purchase price of \$80,000.00, less the cost of drilling a new well. In the light of all of the Arizona cases extant which have been cited to the Court, Appellants respectfully urge that such an assumption is erroneous, and that the District Court, in trying the matter, had no right to make any such assumption or take any legal shortcut. Appellants believe that the District Court was required to follow exactly the rule of the Arizona Supreme Court as laid down in the cases heretofore cited, which is as follows:

“The measure of the damages sustained by the purchaser where a purchase has been induced by fraud is according to the weight of authority, the difference between the real value of the property purchased and the value which it would have had had the representations been true.” *Lufty vs. Roper*, 57 Ariz., at page 502; 27 C.J. 92 §243.

We strongly urge the court to reconsider its decision in the light of the law herein presented, and upon such reconsideration we ask that a rehearing be granted.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

In my judgment the foregoing petition for rehearing is well founded. I hereby certify that it is not interposed for delay.

Dated at Phoenix, Arizona this 24th day of February, 1958.

F. HAZE BURCH

No. 15599

In the
United States Court of Appeals
For the Ninth Circuit

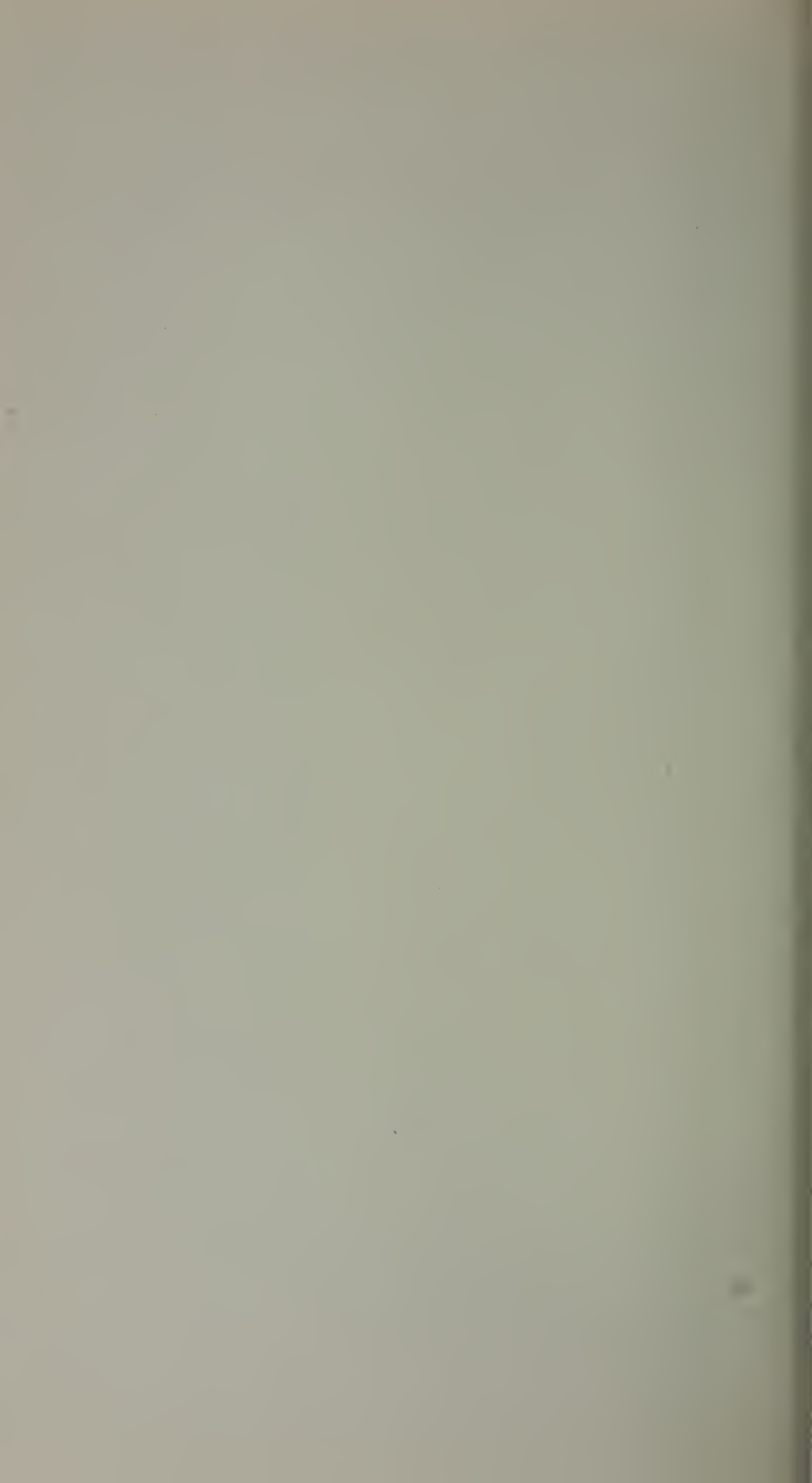
ELMER F. SHEPARD and KATH- RYN M. SHEPARD, his wife, vs. CAL-NINE FARMS, a corporation,	}	<i>Appellants,</i> <i>Appellee.</i>
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Opening Brief of Appellants

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TOPICAL INDEX

	Page
Statement Relative to Jurisdiction.....	1
Statement of the Case.....	2
Specifications of Error.....	4
Summary of Argument.....	17
Argument	19
I. The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates.....	19
II. Cal-Nine Farms, in exercising the rights of Otto and Haas under the Option Agreement dated the 17th day of November, 1954, did not acquire the right to bring an action based on fraud against Elmer F. Shepard and Kathryn M. Shepard.....	25
III. The purported assignment, which is plaintiff's Exhibit 8 in evidence, constituted an attempt to assign a bare action for fraud, and, as such, was not assignable in the absence of statutory authorization.....	23
IV. A mere right to litigation for fraud is a personal action and prior to judgment the beneficiary's claim for damages is a mere expectancy or inchoate right, not assignable in law or equity under Arizona law, and prosecution by the alleged assignee of an action for fraud is contrary to public policy and savors of maintenance.....	27

	Page
V. A corporation cannot bring an action for alleged fraud based upon negotiations between a seller and third parties occurring prior to the corporation's legal existence.....	28
VI. Fraud is never presumed, but must be shown by clear and convincing evidence.....	31
VII. Where one has an equal opportunity to make an independent investigation of real property for purchase, it is presumed he relies on his own investigation rather than representations made to him by the seller, and the purchaser cannot say he had been deceived to his injury	59
VIII. The measure of damages sustained by a purchaser where a purchase of land has been induced by fraud, is, under the Arizona rule, the difference between the real value of the property purchased and the value it was represented to have.....	61
IX. The Federal court is bound to follow the controlling rules of substantive law as declared by state legislatures or the highest state courts in all cases based on diversity of citizenship jurisdiction, unless a Federal constitutional or statutory question is involved.....	64
Conclusion	65

TABLE OF CASES AND AUTHORITIES CITED**Cases**

Carlson v. Brickman, 110 Cal. App. 2d 237, 242 P. 2d 94	16
Cochran Timber Company v. E. L. Fisher, 190 Mich. 478, 157 N.W. 282.....	27
Cole v. Town of Miami, 52 Ariz. 488, 83 P. 2d 797.....	15, 31
Curry v. Windsor, 22 Ariz. 108, 194 P. 958.....	14, 61
Deatsch v. Fairfield, 27 Ariz. 387, 233 P. 887, 38 A.L.R. 651	25
Employers Casualty Co. v. Moore, 142 P. 2d 414, 60 Ariz. 544.....	21, 23, 25, 27
Erie R. R. Co. v. Tompkins, 58 Sup. Ct. 817, 304 U.S. 64, 82 L.Ed. 88.....	14, 64
Farrar v. Churchill, 135 U.S. 609, 10 Sup. Ct. 771, 34 L.Ed. 246.....	60
Fox v. Hirschfield, 142 N.Y. Supp. 261.....	15, 20, 29
Gilliland v. Rodriguez, 268 P. 2d 334, 77 Ariz. 163.....	62
Graham v. LaCrosse & M. R. Co., 102 U.S. 148, 26 L.Ed. 106	27
Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 Fed. 2d 823, reh. den. 118 Fed. 2d 252.....	27
Hidalgo v. McCauley, 50 Ariz. 178, 70 P. 2d 443.....	14, 61
Huston v. Ohio & Colo. S. & R. Co., 63 Colo. 152, 165 P. 251	20
Law v. Sidney, 47 Ariz. 1, 53 P. 2d 64.....	16, 58, 60
Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161	10, 14, 61, 63
National Shawmut Bank of Boston v. Johnson, 58 N.E. 2d 849, 317 Mass. 485.....	27

	Page
Nearpark Realty Corp. v. City Investing Company, 112 N.Y. Supp. 2d 816.....	15, 28, 30
New York Life Insurance Co. v. Rogers, 126 F. 2d 784 (CCA Ariz.).....	14, 64
Prosser v. Edmonds, 1 Y. & C. 481 [Court of Ex- chequer]	27
Ren v. Jones, 38 Ariz. 476, 1 P. 2d 110.....	14, 61
Schwaibach v. Jones, 27 Ariz. 260, 232 P. 558.....	31
Schwartz v. Durham, 52 Ariz. 256, 80 P. 2d 456.....	13, 14, 15, 19, 20, 21, 23, 25, 27
Shapiro v. Goldberg, 192 U.S. 232, 24 Sup. Ct. 259, 48 L.Ed. 419.....	59
Sims Printing Co. v. Kerby, 106 P. 2d 197, 56 Ariz. 130	16, 31
Springer v. The Bank of Douglas, 313 P. 2d 399; Ariz.	58, 60
Stewart v. Phoenix National Bank, 64 P. 2d 101, 49 Ariz. 34.....	16, 31
Swift v. Tyson [1842], 16 Pet. (U.S.) 1, 10 L.Ed. 865.....	64
Weylin Hotel Corp. v. Ritter, et al., 114 N.Y. Supp. 2d 158	29
Wilson v. Byrd, 288 P. 2d 1079, 79 Ariz. 302.....	60
Wood v. Ford, 72 P. 2d 423, 50 Ariz. 356.....	16, 31
Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319.....	14, 61

Authority

McCormick on Damages.....	11
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In the
United States Court of Appeals
For the Ninth Circuit

ELMER F. SHEPARD and KATH-
RYN M. SHEPARD, his wife,

Appellants,

vs.

CAL-NINE FARMS, a corporation,

Appellee.

No. 15599

Opening Brief of Appellants

STATEMENT RELATIVE TO JURISDICTION

The original jurisdiction of the District Court was invoked by appellee, plaintiff below, by reason of the diversity of citizenship of the parties. Appellants, defendants below, are citizens and residents of Arizona. Appellee, plaintiff below, is a corporation organized and existing under the laws of the State of California, and is a citizen of California. The amount in controversy in this case exceeds \$3,000.00, exclusive of interest and costs. The District Court assumed jurisdiction of the case under Section 1332 of Title 28, U.S.C. The Court of Appeals has jurisdiction to review the judgment of the District Court under Section 1291 of Title 28, U.S.C.

STATEMENT OF THE CASE

Appellee, plaintiff below, sued defendants, alleging fraud in the sale of certain farm land in the Harquahala Valley near the west end of Maricopa County, Arizona. The contract was evidenced by an option agreement, plaintiff's Exhibit A (Tr., p. 9), and the escrow instructions, plaintiff's Exhibit 2 (Tr., p. 23), admitted in Evidence. The purchase price was \$80,000.00, with an earnest money payment of \$2,000.00 and a later payment of \$18,000.00 upon the matter going into escrow. The balance of \$60,000.00 was to be payable over a period of years.

Cal-Nine Farms is a California corporation that was not in existence at the time of the alleged fraud it complains of. The corporation was formed after an option agreement had been signed by the appellants and one Ernest Otto and one Henry Haas, representing a syndicate of nine purchasers. On the first day of the trial Cal-Nine Farms, the plaintiff, hereinafter referred to as "plaintiff" or by name, filed an amended complaint, alleging that Otto and Haas entered into the option agreement with the defendant Elmer Shepard with the intent on the part of said Otto and Haas to have the option exercised by a corporation they intended to form (Tr., p. 95). Otto and Haas also executed a purported assignment of their rights to bring an action for fraud to the plaintiff corporation, again on the first day of the trial (Tr., pp. 278-279; also, Tr., pp. 154-155). Plaintiff also re-alleged in the amended complaint the allegations of fraud that were originally set forth in the original complaint. The complaint alleged that by reason of the fraudulent misrepresentations of the defendant Elmer F. Shepard, the plaintiff corporation was induced to purchase the Shepard farm and in so doing was damaged in the sum of \$45,525.00 actual damages and

\$20,000.00 punitive and exemplary damages. The defendants denied these allegations of fraud and denied that the plaintiff corporation brought the action as assignee of the nine investors or in its own right (Tr., pp. 80-81). It is the contention of the appellants, defendants below, and hereinafter referred to by name or as "defendants", that the plaintiff corporation had no right of action against the defendants for alleged fraudulent misrepresentations made to individuals before the corporation was formed, and was not a bona fide assignee of any right to such an action.

There is no dispute between the parties that the conversations complained of by the plaintiff all occurred prior to the time the corporation was formed (Tr., pp. 272-273). Defendants, in addition to denying any fraudulent misrepresentations and denying plaintiff's right to appear in the action as a party plaintiff, also denied that plaintiff had proved its damages, and contended that plaintiff failed to show the proper measure of damages and that the court, therefore, could not make an award of damages on behalf of the plaintiff.

The issues presented by the appeal are:

I. Is the plaintiff a proper party in an action for fraud, when the alleged fraudulent misrepresentations are made to individuals before the plaintiff corporation is formed?

II. If the plaintiff is a proper party plaintiff, has it sustained the burden of proof necessary in a case of fraud?

III. If plaintiff has sustained the necessary burden of proof, has the proper measure of damages been applied?

These points were all raised in the District Court by the defendants upon motions and objections.

SPECIFICATIONS OF ERROR

1. The District Court erred in making its Finding of Fact No. II, which reads:

“On or about November 17, 1954, defendant Elmer F. Shepard made certain representations to one Ernest Otto and one Henry Haas regarding the condition of a well on the land described in Finding III which was owned by Shepard. At the time these representations were made, it was contemplated by Otto and Haas and certain other residents of California to form plaintiff corporation in order to purchase the land in question from defendant Shepard. These facts were known to Shepard.”

for the reason that there is no evidence that the defendant Elmer F. Shepard made representations regarding the condition of the well on the land which he owned. The evidence in the record clearly shows that Shepard voiced only an opinion as to the output of water from the well and an opinion as to the condition of the pump and machinery. There is no evidence in the record that Shepard at this time, to-wit, November 17th, 1954, had any knowledge that Otto and Haas and certain other residents of California intended to form a corporation to purchase his land.

2. The District Court erred in making its Finding of Fact No. IV, which reads:

“The specific representations made by Shepard at that time and place were as follows:

“(a) That it was Shepard’s opinion that the well on the land would pump twenty-two hundred gallons of water per minte.

“(b) That the pump had been pulled from the well on only two occasions; once due to a mistake on the part of the pump company, and once for the purpose of deepening the well.

“(c) That the well was in good condition.

“(d) That the well would run seventy-five two-inch siphon tubes for the purpose of irrigation.”

for the reason that the court made the erroneous assumption that an opinion is the same as a representation of fact, and there is no evidence to support such purported finding, and the evidence in the record is contrary to such finding.

3. The District Court erred in making its Finding of Fact No. VI, which reads:

“Otto inspected the pump and well at the time of this conversation, but was prevented from learning the true condition of the well by virtue of the fact that the spout of the well had an elbow in it and a baffle had been welded into the elbow. The combined effect of the baffle and elbow gave an appearance of a considerably more flow of water from the spout than was actually the case.”

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

4. The District Court erred in making its Finding of Fact No. VII, which reads:

“Otto was an experienced California cotton farmer, but had had no acquaintance with deep water wells of the kind used in Arizona.”

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

5. The District Court erred in making its Finding of Fact No. IX, which reads:

“Each of the representations described in Finding IV were false in the following regard:

“(a) The pump at the time the representation was made, and for several months previous thereto had been incapable of pumping more than fifteen hundred gallons per minute. Shepard was aware of this and did not believe the pump would put out twenty-two hundred gallons per minute.

“(b) The pump had actually been pulled four times in less than two years, and Shepard has spent over Twelve Thousand Dollars (\$12,000.00) in an effort to salvage what the man who drilled it described as a ‘bad well from the day it was drilled’.

“(c) The casing in the well was broken or collapsed at a point somewhere between four hundred feet and five hundred feet down.

“(d) The well would not at the time of the conversation, nor for a period of several months before, run more than sixty two-inch tubes for the purpose of irrigation.”

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

6. The District Court erred in making its Finding of Fact No. X, which reads:

“Defendant Elmer Shepard knew that each of these representations were false.”

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

7. The District Court erred in making its Finding of Fact No. XI, which reads:

“Defendant Elmer Shepard intended that these representations be acted upon by Otto and Haas, and by plaintiff which he knew at that time Otto and Haas contemplated forming.”

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

8. The District Court erred in making its Finding of Fact No. XII, which reads:

“Each of these representations was material to the transaction involved, since the presence or absence of water on the desert land in this area is the principal factor in fixing the value of the land.”

for the reason that it is based on the erroneous assumption that Shepard made material representations to Otto and Haas, and all of the evidence in the record is contrary to such finding and assumption.

9. The District Court erred in making its Finding of Fact No. XIII, which reads:

“Neither Otto nor Haas, nor any other agent of the plaintiff at any time prior to the execution of the agreement described below knew of the falsity of these representations.”

for the reason that said finding is based on the erroneous assumption that Shepard made false representations to

Otto and Haas, and all of the evidence in the record is contrary to such assumption and to such finding.

10. The District Court erred in making its Finding of Fact No. XIV, which reads:

“Otto and Haas, in reliance on the truth of these representations, and in contemplation of forming a corporation to exercise the option, entered into an option agreement on November 17, 1954, with defendants Elmer and Kathryn Shepard whereby they obtained an option to purchase the land in question for the sum of Two Thousand Dollars (\$2,000.00).”

for the reason that said finding is based on the erroneous assumption that Otto and Haas relied on representations of Shepard, and for the reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

11. The District Court erred in making its Finding of Fact No. XVI, which reads:

“Plaintiff, by its agent Otto, went into possession of the land in March, 1955, and immediately commenced irrigating in preparation for a cotton crop. When first turned on, the pump in the well in question produced less than fifteen hundred gallons of water per minute, and thereafter its output constantly declined throughout the summer so that by September, 1955, it produced only two hundred and fifty gallons per minute. Otto, on behalf of plaintiff, sought and followed the advice of an expert well driller as to how best to conserve the well. In October, 1955, it was necessary to completely replace the well and drill a new one. Plaintiff expended the sum of Twenty-two Thousand Six Hundred Six and 40/100 Dollars (\$22,606.40) in drilling and equipping a new well. The expenditure of this sum was reasonably necessary to produce a well approximately equivalent in

cost to that represented by Shepard as being on the property at the time of sale.”

for the reason that such finding erroneously assumes that the cost of the replacement of a well is the proper measure of damages in a case based on fraud in a sale of land, when the Arizona rule in such cases is to the contrary, and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

12. The District Court erred in making its Finding of Fact No. XVII, which reads:

“Plaintiff’s cotton crop was damaged by the lack of water directly resulting from the failure of the well. Plaintiff, by its agent Otto made reasonable efforts to get water elsewhere but was unsuccessful in so doing. The difference in the value at maturity of the crop which would have resulted had the water supply been as represented, and that which actually did result, was Twelve Thousand Five Hundred Dollars (\$12,500.00).”

for the reason that it makes the erroneous assumption that the measure of damages for loss of crop in Arizona is the difference in value at maturity of the crop which would have resulted had the water supply on the land been as represented, when the Arizona rule is to the contrary; and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

13. The District Court erred in making its Finding of Fact No. XVIII, which reads:

“Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas.”

for the reason that it is a conclusion of law and not a finding of fact, and for the further reason that there is no evidence to support such purported finding and all of the evidence in the record is contrary to such finding.

14. The District Court erred in making its Conclusion of Law No. 1, which reads:

“1. This Court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332.”

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

15. The District Court erred in making its Conclusion of Law No. 2, which reads:

“2. By reason of the fraudulent misrepresentation of defendant Elmer Shepard, defendants are liable to plaintiff for damages sustained by plaintiff which were proximately caused by said representations.”

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

16. The District Court erred in making its Conclusion of Law No. 3, which reads:

“3. Under Arizona law, the measure of damages for fraudulent misrepresentation is the so-called ‘benefit of the bargain’ rule, or the difference between the value as represented and the actual value. *Lutfy vs. R. D. Roper & Sons*, 57 Ariz. 495, 115 P. 2d 161. In the situation of this case, a recognized alternative

measure proceeding on the same theory is the reasonable cost of placing the property received in the condition in which it was represented to be. McCormick on Damages, Section 122, p. 154."

in that the court makes the erroneous assumption that an alternative to the Arizona rule, which is also called the "benefit of the bargain" rule is the "out-of-pocket" rule, which is in direct conflict with the "benefit of the bargain" rule, and for the further reason that it also conflicts with Finding of Fact No. XVII to the point that the factual situation presented by the record does not support such erroneous conclusion.

17. The District Court erred in making its Conclusion of Law No. 4, which reads:

"4. These damages amount to Thirty-five Thousand One Hundred Six and 40/100 Dollars (\$35,106.40)."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion.

18. The District Court erred in making its Conclusion of Law No. 5, which reads:

"5. Plaintiff is entitled to judgment against defendant in the amount of Thirty-Five Thousand One Hundred Six and 40/100 Dollars (\$35,106.40)."

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record, and there is no evidence in the record to support such erroneous conclusion, and for the further reason that said conclusion is based upon the erroneous

assumption that the Arizona rule, to-wit, the "benefit of the bargain" rule, as the measure of damages need not be followed.

19. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. I, which reads:

"On November 17, 1954, defendants Elmer F. Shepard and Kathryn M. Shepard entered into an option to purchase agreement with Ernest Otto and Henry Haas. The option to purchase concerned certain land located in the State of Arizona, County of Maricopa more particularly described as follows, to-wit:

The North One-Half of Section 21, Township 1 North, Range 9 West, Gila and Salt River Base and Meridian."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of plaintiff and defendants.

20. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. II, which reads:

"That said Otto and Haas had the opportunity to investigate said property and the chattels thereon and did, in fact, investigate the same, and thereafter entered into the option agreement aforesaid."

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiff and defendants.

21. The District Court erred in refusing to find as a fact the matter set forth in Defendants' Requested Finding of Fact No. III, which reads:

“That said Otto and Haas entered into said option agreement by virtue of their own investigation of the aforesaid real property and not by reason of any representations made to them by the defendants Shepard, or either of them.”

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of both the plaintiff and defendants.

22. The District Court erred in refusing to find as a fact the matter set forth in Defendants’ Requested Finding of Fact No. IV, which reads :

“That the value of the aforesaid real property at the time the option agreement was entered into was in excess of the purchase price paid by the plaintiff, who is the assignee of said Otto and Haas, and plaintiff has not been damaged.”

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiff and the defendants.

23. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants’ Requested Conclusion of Law No. I, which reads :

“The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff.

Schwartz v. Durham, 52 Ariz. 256, 80 P. 2d 456”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

24. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants’ Requested Conclusion of Law No. II, which reads :

“The Federal Court is bound to follow the controlling rules of substantive law, as declared by state legislatures or the highest state courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal constitutional or statutory question is involved.

Erie R.R. Co. v. Tompkins, 58 Sup. St. 817, 304

U.S. Ct. 64, 82 L. Ed. 88;

New York Life Insurance Co. v. Rogers, 126 F. 2d 784 (CCA Ariz.)”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

25. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. III, which reads:

“The measure of damages to be applied in this case is the difference between the real value of the property purchased and the value it was represented to be worth.

Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161;

Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319;

Curry v. Windsor, 22 Ariz. 108, 194 P. 958;

Ren v. Jones, 38 Ariz. 476, 1 P. 2d 110;

Hidalgo v. McCauley, 50 Ariz. 178, 70 P. 2d 443.”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

26. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. IV, which read:

“An action for fraud is a personal action, not assignable.

Schwartz v. Durham, 52 Ariz. 256, 80 P. 2d 456.”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

27. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. V, which reads:

“A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.

Nearpark Realty Corp. v. City Investing Company,
112 N.Y. Supp. 2d 816;
Fox v. Hirschfield, 142 N.Y. Supp. 261;
Schwartz v. Durham, ID”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

28. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. VI, which reads:

“Fraud is never presumed, but must be shown by clear and convincing evidence.

Cole v. Town of Miami, 52 Ariz. 488, 83 P. 2d 797”

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

29. The District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants' Requested Conclusion of Law No. VII, which reads:

“Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman, 110 Cal. App. 2d 237, 242 P. 2d 94;

Law v. Sidney, 47 Ariz. 1, 53 P. 2d 64''

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

30. The District Court erred in rendering judgment in favor of the plaintiff and in denying defendants' motion for a new trial, because all of the evidence in the case, viewed in the light most favorable to the plaintiff, fails to disclose that there was any reliance by Otto and Haas upon any statements of Shepard that caused them to make the purchase of the land in question, and such being the case, plaintiff has failed to meet the necessary proof of fraud as set forth in *Wood v. Ford*, 72 P. 2d 423, 50 Ariz. 356, and has failed to prove all the elements of actionable fraud, to-wit: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance upon its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

Stewart v. Phoenix National Bank, 64 P. 2d 101, 49 Ariz. 34;

Sims Printing Co. v. Kerby, 106 P. 2d 197, 56 Ariz. 130.

SUMMARY OF ARGUMENT

The argument on behalf of defendants-appellants will be presented under the following sub-headings:

I. The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates. (Specifications of Error Nos. 13, 23 and 26.)

II. Cal-Nine Farms, in exercising the rights of Otto and Haas under the Option Agreement dated the 17th day of November, 1954, did not acquire the right to bring an action based on fraud against Elmer F. Shepard and Kathryn M. Shepard. (Specifications of Error Nos. 13 and 23.)

III. The purported assignment, which is plaintiff's Exhibit 8 in Evidence, constituted an attempt to assign a bare action for fraud, and as such, was not assignable in the absence of statutory authorization. (Specifications of Error Nos. 13, 14, 23 and 26.)

IV. A mere right to litigation for fraud is a personal action and prior to judgment the beneficiary's claim for damages is a mere expectancy or inchoate right, not assignable in law or equity under Arizona law, and prosecution by the alleged assignee of an action for fraud is contrary to public policy and savors of maintenance. (Specifications of Error Nos. 13, 14, 23 and 26.)

V. A corporation cannot bring an action for alleged fraud based upon negotiations between a seller and third parties occurring prior to the corporation's legal existence. (Specifications of Error Nos. 27, 13, 14 and 23.)

VI. Fraud is never presumed, but must be shown by clear and convincing evidence. (Specifications of Error Nos. 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 19, 20, 28 and 30.)

VII. Where one has an equal opportunity to make an independent investigation of real property for purchase, it is presumed he relies on his own investigation rather than representations made to him by the seller, and the purchaser cannot say he has been deceived to his injury. (Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 20, 21 and 29.)

VIII. The measure of damages sustained by a purchaser where a purchase of land has been induced by fraud, is, under the Arizona rule, the difference between the real value of the property purchased and the value it was represented to have. (Specifications of Error Nos. 11, 12, 15, 16, 17, 18, 22 and 25.)

IX. The Federal Court is bound to follow the controlling rules of substantive law as declared by state legislatures or the highest state courts in all cases based on diversity of citizenship jurisdiction, unless a federal constitutional or statutory question is involved. (Specifications of Error Nos. 15, 16, 17, 18 and 24.)

ARGUMENT

I. The Right of Action Growing out of Fraud is Usually a Personal Right to the Extent That It Does Not Pass with an Assignment of the Thing to Which the Right Relates. (Specifications of Error Nos. 13, 23 and 26.)

The foregoing proposition of law was considered by the Arizona Supreme Court in the case of *Schwartz v. Durham*, 52 Ariz. 256, 80 P. 2d 456. In the *Schwartz* case, the appellant specifically in writing conveyed to the appellee as a part of the settlement of community rights incurred during marriage between the parties two hundred shares of stock in a Phoenix company, the sale of which by a California company to appellee gave rise to a cause of action for fraud instituted in a separate case brought by appellee, being settled by a payment of money by the California company. Appellant, becoming aware of the settlement of the cause filed by appellee separately for fraud, made demand upon appellee for one-half of the proceeds of the settlement, alleging that the assignment of stock by appellant to appellee did not transfer the cause of action for fraud, and secondly, that the settlement of the community rights of the property in the original divorce action settled only those rights which both parties knew to exist. In determining the case, the Arizona Supreme Court said:

“The trial court apparently based its judgment on the belief that the transfer of the stock carried with it the cause of action as a matter of law.”
Schwartz v. Durham, 52 Ariz. 265, at page 263.

The appellant, in support of her theory that the transfer of the stock did not carry with it the cause of action for

fraud as a matter of law, cited to the Arizona Supreme Court the case of *Huston v. Ohio & Colo. S. & R. Co.*, 63 Colo. 152, 165 P. 251. The Arizona Supreme Court cited the foregoing case of *Huston v. Ohio & Colo. S. & R. Co.*, at page 252, as follows:

“ ‘The right of action growing out of fraud is usually a personal right to the extent that it does not pass with an assignment of the thing to which the right relates. *Worsham v. Brown*, 4 Ga. 284; *Mullinax v. Lowry*, 140 Missouri App. 42, 124 S.W. 572; *Steele v. Brazier*, 139 Mo. App. 319, 123 S.W. 477; *Fox v. Hirschfeld*, 157 App. Div. 364, 142 N.Y. Supp. 261; 5 C.J. 952, Note 22e.’ and with this statement we agree.” (Emphasis supplied.)

The court then further found that the wife did not contemplate transferring this cause of action in the property settlement because it was unknown to either of the parties at that time, and therefore, that no transfer was made via the property settlement. It is interesting to note that in the citations included in the quotation above is the case of *Fox v. Hirschfeld*, 157 App. Div. 364, 142 N.Y. Supp. 261, wherein a plaintiff purchased land under a contract and assigned the contract to his wife. In a subsequent action for fraud, the court held that the right of action for fraud was not effectively assigned to his wife by an assignment to her of the contract. It further held that the damages to the plaintiff were the difference between the value of the property had the representations about it been true and its actual value.

It is the contention of the defendants Shepard herein that there was no fraud in the transaction out of which the present litigation grew, but that even if the court did find as a fact that a fraud had occurred, in view of the decision of the Arizona Supreme Court in *Schwartz v.*

Durham, cited above, such right of action was a personal one in Otto, Haas and the other seven original investors and was not one which could be transferred, in view of the Arizona law on the subject. The matter of assignability was reviewed a second time by the Arizona Supreme Court in the case of *Employers Casualty Co. v. Moore*, 142 P. 2d 414, 60 Ariz. 544. In this case the Arizona Supreme Court reiterated its former statement that rights of action for torts causing injuries which are strictly personal do not survive the plaintiff's death, and that whether or not a chose in action is assignable depends on whether it will survive assignor's death and pass to his personal representative. In the instant case it is clear that the action for fraud is indeed a personal one that would not survive under the Arizona statutes applicable at the time of trial in the District Court, and therefore, the cause was not one which could have been assigned to the plaintiff corporation.

If the District Court had followed the Arizona Supreme Court's rulings in the *Schwartz* case and the *Employers Casualty Co. v. Moore* case, cited above, it could not have made its Finding of Fact No. XVIII, which reads as follows:

“Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas.”

The District Court should have made Conclusion of Law No. I, as submitted by defendants below, which read:

“The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff.”

and Defendants' Requested Conclusion of Law No. VI, which reads:

“Fraud is never presumed, but must be shown by clear and convincing evidence.” (Tr., p. 31),

for the reason that the plaintiff, Cal-Nine Farms corporation, appellee here, had no cause of action in its own right and could not have been an assignee of the rights of Otto and Haas or any other parties where such cause of action grew out of fraud, and was, therefore, incapable of showing by clear and convincing testimony that said corporation had ever been defrauded by the defendants, appellants herein.

II. Cal-Nine Farms, in Exercising the Rights of Otto and Haas Under the Option Agreement Dated the 17th day of November, 1954, Did Not Acquire the Right to Bring an Action Based on Fraud Against Elmer F. Shepard and Kathryn M. Shepard. (Specifications of Error Nos. 13 and 23.)

The Option Agreement dated November 17th, 1954 and attached to plaintiff's complaint as Exhibit A (Tr., p. 9), is nothing more than a bare option to purchase certain described real and personal property. This option gives to the parties signatory, to-wit, Ernest H. Otto and Henry Haas and their successors or assigns, the right to purchase the property for an agreed price of \$80,000.00 on or before the 17th day of January, 1955. There was no attempt by the sellers, appellants herein, in the Option to Purchase of November 17th, 1954, to do more than agree to sell the described real and personal property to Otto and Haas their successors or assigns. Otto and Haas on their part in said Option to Purchase acquired no rights under said instrument, except to purchase for the agreed price or by inference, to convey said right to purchase to others.

Under the authority of *Schwartz v. Durham*, above, and *Employers Casualty Co. v. Moore* above, no right of action for fraud was assigned by said exhibit, nor could plaintiff, appellee herein, have acquired any right to bring an action based on said exhibit.

III. The Purported Assignment, Which is Plaintiff's Exhibit 8 in Evidence, Constituted an Attempt to Assign a Bare Action for Fraud, and, as Such, was not Assignable in the Absence of Statutory Authorization. (Specifications of Error Nos. 13, 14, 23 and 26.)

If the Court agrees that under Arguments I and II above the Cal-Nine Farms corporation acquired nothing in the Option to Purchase of November 17th, 1954 which would entitle it to bring an action in fraud against the defendants, then the right of said corporation to bring the action rests entirely upon plaintiff's Exhibit 8 (Tr., p. 24). It is to be noted that said exhibit was not executed until long after the action had been filed by the Cal-Nine Farms corporation, and, in fact, not until the issue was joined in trial in the District Court (Tr., p. 279). Additionally, as was mentioned in Argument under paragraph I, the said purported assignment could not pass any rights other than those owned by the signatories, if, indeed, any they did own. In the case of *Employers Casualty Co. v. Moore* hereinbefore cited, plaintiffs were lawyers employed to bring a personal injury action by reason of negligent operation of an automobile. The contract of employment was in writing and under the clients agreed to pay said attorneys for their services as follows:

“An amount equal to thirty-three and one-third percent (33-1/3%) of all sums recovered, whether by suit or compromise.

“This retainer shall operate as an assignment *pro tanto* to said Second Parties of any claim or right of recovery insofar as such assignment may be lawful arising out of, or instant to, the matter or matters in which Second Parties are retained to perform said services, and of anything received or collected therefor or of judgment obtained thereon.”

Later the clients, without consulting their attorneys, compromised the matter for \$1,900.00 with the insurance company representing the adverse parties. The lawyers who had received the foregoing quoted assignment then started an action against Employers Casualty Company, insurer of the adverse party, to recover the fee for their legal services, alleging that the insurance company with full knowledge of the contract between the lawyers and their clients induced the clients to settle and compromise their claim for an inadequate sum, upon the theory that the \$1,900.00 paid under the compromise was two-thirds of the insurance company's admitted liability. The lawyer plaintiffs alleged that they were entitled to one-third of the sum of \$2,850.00, or \$950.00, for which they prayed judgment. The court, after hearing the case, gave plaintiffs judgment for the one-third of \$1,900.00, or for the sum of \$633.33. The company perfected an appeal to the Arizona Supreme Court, and its first assignment of error was as follows:

“1. The court erred in holding that the contract of employment operated as an equitable assignment *pro tanto* to the appellees, for the reasons that rights in actions for personal injuries are not assignable.”

The sufficiency of this assignment was challenged, and the Supreme Court determined that the assignment conformed with its rules and that it was a plain and concise statement of the error charged. The court then held that said assignment was of no value, stating as follows :

“(2-3) It is well settled in this jurisdiction that an action for personal injuries, such as the one here, does not survive. In *Deatsch v. Fairfield*, 27 Ariz. 387, 397; 233 P. 887, 891; 38 A.L.R. 651, it is said :

“ ‘The test of assignability of a chose in action is whether it will survive and pass to the personal representative. If it will survive, it can be assigned’

“ ‘This statement of the law was later approved in *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554, 296 P. 262. The general rule is stated as follows : ‘The general doctrine, both at law and in equity, is that rights of action for torts causing injuries which are strictly personal and which do not survive are not capable of being assigned’ 4 Am.Jur. 252, §30.

“ ‘In the absence of statutory modification, a cause of action for death by wrongful act is not assignable, and it has been held that, prior to verdict or judgment, the beneficiary’s claim for damages is a mere expectancy, or inchoate right, not a debt, and not assignable. . . .’ 6 C.J.S. Assignments, page 1082, § 33.”

The record below is devoid of any evidence which would indicate statutory authorization in the State of Arizona for the assignment of an action based on fraud, nor did plaintiff, at any time during the trial of the matter, contend that such statute did, in fact, exist. Plaintiff offered plaintiff’s Exhibit S, and the same was admitted in evidence over the objection of the defendants (Tr. p. 156), in an apparent effort to give Cal-Nine Farms corporation some standing in the District Court. In view of the Arizona Supreme Court’s decisions in the cases of *Schwartz v. Durham*, *Employers Casualty Co. v. Moore* and *Deatsch v.*

Fairfield, cited above, the assignments gave the plaintiff no standing in court and conferred no jurisdiction on the court on which it could base its Finding of Fact No. XVIII, which reads:

“Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas.”

and such Finding of Fact was clearly erroneously when viewed in the light of the existing Arizona Supreme Court decisions in point. Defendants contend the same objection is valid as to the District Court’s Conclusion of Law No. 1, which reads:

“1. This court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332.”

In view of the foregoing decisions, defendants contend that the District Court erred in refusing to conclude as a matter of law the matter set forth in Defendants’ Requested Conclusion of Law No. 1, which reads:

“The court does not have jurisdiction of the matter, because plaintiff is not a proper party plaintiff.” and Defendants’ Requested Conclusion of Law No. 4, which reads:

“An action for fraud is a personal action, not assignable.”

IV. A Mere Right to Litigation for Fraud is a Personal Action and Prior to Judgment the Beneficiary's Claim for Damages is a Mere Expectancy or Inchoate Right, Not Assignable in Law or Equity Under Arizona Law, and Prosecution by the Alleged Assignee of an Action for Fraud is Contrary to Public Policy and Savors of Maintenance. (Specifications of Error Nos. 13, 14, 23 and 26.)

In support of the foregoing proposition, the Court is referred to the following cases: *Schwartz v. Durham*, 80 P. 2d 453, 52 Ariz. 256; *Employers Casualty Co. v. Moore*, 142 P. 2d 414, 60 Ariz. 544; *National Shawmut Bank of Boston v. Johnson*, 58 N.E. 2d 849, 317 Mass. 485; *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 Fed. 2d 823, rehearing denied 118 Fed. 2d 252; *Cochran Timber Company v. E. L. Fisher*, 190 Mich. 478, 157 N.W. 282; *Graham v. LaCrosse & M. R. Co.*, 102 U.S. 148, 26 L. Ed. 106. The Court's attention is particularly directed to the *Cochran Timber Company* case cited above, for the reason that that case is bottomed upon case law of Michigan, and the Michigan, Supreme Court's decisions in such instances are similar to those of the Arizona Supreme Court heretofore cited. The cases in many jurisdictions arise out of some type of statutory authorization, and are therefore, not always directly in point as the Michigan cases seem to be. The case of *Graham v. LaCrosse & M. R. Co.*, cited above, is deemed of value for the reason that the United States Supreme Court in that early landmark case cites the history of the development of the Arizona and Michigan rule in the common law of England and under the early American cases. This decision cites *Prosser v. Edmonds*, 1 Y. & C. 481 in

the Court of Exchequer, a landmark English case which holds the assignment of an action for fraud was opposed to the spirit of the common law and savored of champerty and maintenance.

V. A Corporation Cannot Bring an Action for Alleged Fraud Based upon Negotiations Between a Seller and Third Parties Occurring Prior to the Corporation's Legal Existence. (Specifications of Error Nos. 27, 13, 14 and 23.)

Under the Arizona rule, where the Supreme Court has stated that a personal action cannot be assigned, the Cal-Nine Farms corporation did not enter the trial possessed of any cause of action against defendants, and the attempt to convey such right by an assignment as evidenced by plaintiff's Exhibit No. 8 could not have clothed the corporation in such legal right. This is evidenced by a case directly in point decided by the New York Supreme Court in 1952 in the matter of *Nearpark Realty Corporation v. City Investing Company*, 112 N.Y. Supp. 2nd 816. New York, at the time of this case, had a special statute authorizing the assignment of a cause of action for alleged fraud (§41, Personal Property Law). The plaintiff corporation as an assignee of a contract to purchase real estate sought to rescind on the grounds of fraudulent concealment. At the time the contract was entered into, the plaintiff corporation was not yet in existence. The New York Supreme Court held, in Paragraphs (1-3):

“It follows that only the plaintiff's assignor may rescind or sue for damages for fraud and deceit; the representations were made to it alone and it alone had the right to rely upon them, since there was not an assignment to the plaintiff of the cause of action for re-

cision or of the cause of action for fraud and deceit. *Fox v. Hirschfield*, 157 App. Div. 364, 365; 142 N.Y. Supp. 261, 262. In the case cited, the court declared that in the absence of an assignment of a cause of action based upon the fraud *as distinguished from an assignment of the contract of purchase of the property*, the cause of action belongs to the assignor. (Emphasis supplied)

"The fact that the plaintiff and its assignor may have identical officers, directors and stockholders is of no legal consequence, since for the purpose of the present action they must be regarded as separate and distinct entities. Defendant's representations, whether active or passive, were not made to the present plaintiff, but to its assignor."

The defendant's motion to dismiss was granted in a similar case decided in New York in 1952 in the matter of *Weylin Hotel Corp. v. Ritter, et al*, 114 N.Y. Supp. 2d 158, which was an action to rescind the contract of sale of a hotel wherein the alleged misrepresentations were made January 30th, 1951 and the plaintiff corporation was incorporated the next day, January 31st, 1951, on which date the contract was assigned to the plaintiff. It was held there was no assignment of the cause of action to the plaintiff. In this case the court held:

. . . . "The rule seems well established that the assignee of the original contract, under the facts so alleged in the present complaint, may not sue the vendor for fraud allegedly inducing the contract. *Gulfoyle v. Pierce*, 125 App. Div. 504; 109 N.Y. Supp. 924; *Fox v. Hirschfield*, 157 App. Div. 364; 142 N.Y. Supp. 261; *Ettar Realty Co. v. Cohen*, 163 App. Div. 409; 148 N.Y. Supp. 659. . . ."

Defendants wish to point out to the Court that in the case of *Fox v. Hirschfield* cited above by the New York

Supreme Court in the case of *Nearpark Realty Corporation v. City Investing Company*, cited above, the court was in full accord with defendant's position that an assignment of the contract of purchase of property does not constitute an assignment for an action in fraud. The record at the trial reveals that the plaintiff's witness Otto testified he did not remember and did not know whether any assignment had ever been made to the Cal-Nine Farms Corporation (Tr., p. 138), admitted that the assignment admitted in evidence by the court was executed the day of the trial (Tr., pp. 154-155), and further, that the Cal-Nine Farms corporation never made any acceptance of that assignment or knew anything about it (Tr., p. 155). Proper objection to its admission was made at this time, but the same was admitted by the court (Tr., p. 156). The partner Haas also testified (Tr., p. 279) that the purported assignment, which is plaintiff's Exhibit 8 in evidence, was executed at noon on the first day of the trial. The witness Haas also testified (Tr., p. 279) that he recalled the corporation had authorized the instant lawsuit, but was unable to state a date, and Cal-Nine Farms, plaintiff below, never produced corporate minutes to prove this statement (Tr. p. 279). This situation was again brought to the court's attention by a proper motion for the defendants at the close of the plaintiff's case (Tr., pp. 314, 315).

VI. Fraud is never Presumed, but Must be Shown by Clear and Convincing Evidence. (Specifications of Error Nos. 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 19, 20, 28 and 30.)

The foregoing proposition has long been cited by the Supreme Court of Arizona as the law in that jurisdiction. *Schwaibach v. Jones*, 27 Ariz. 260, 232 P. 558; *Cole v. Town of Miami*, 83 P. 2d 997; 52 Ariz. 488.

Did the plaintiff sustain the burden of proof and prove its case by clear and convincing testimony in the District Court? Defendants think not and point out to the Court that there are nine elements of actionable fraud under the Arizona rule, to-wit:

1. A representation.
2. Its falsity.
3. Its materiality.
4. The speaker's knowledge of its falsity or ignorance of its truth.
5. His intent that it should be acted upon and in the manner reasonably contemplated.
6. The hearer's ignorance of its falsity.
7. His reliance upon its truth.
8. His right to rely thereon.
9. His consequent and proximate injury.

Wood v. Ford, 72 P. 2d 423, 50 Ariz. 356;
Stewart v. Phoenix National Bank, 64 P. 2d 101,
 49 Ariz. 34;
Sims Printing Company v. Kerby, 106 P. 2d 197,
 56 Ariz. 130.

Taking each of these elements in order, defendants feel that plaintiff failed completely to prove its case by clear and convincing testimony in the District Court, and cite the record to the Court as follows:

1. *A representation.*

The first conversation between plaintiff and defendants below occurred, according to the testimony of Otto, in approximately October, 1954, and was related in court as follows (Tr., pp. 86-87):

"Q. Would you state the conversation?

"A. Well, I was on the end of the rows there just waiting for the pickers to come up, and Elmer, he rode up on horseback that day, and we just had a general conversation, and I asked him if their ranch was for sale, that is, Gordon Cameron and Ed Swindle told me it was for sale, and I just wanted to find out if it was.

"Q. And what did Mr. Shepard answer?

"A. He said yes, he was trying to sell it.

"Q. Was there any discussion of price?

"A. Yes.

"Q. Did Mr. Shepard quote a price at that time?

"A. Yes.

"Q. What price did he quote?

"A. \$80,000.

. . . .

"Q. Did you have any discussion as to the well on the land at this time, at that time you first talked to Mr. Shepard about the property?

"A. I think we did.

"Q. Will you state that discussion.

"A. Well, I asked him several questions about it, and I asked him about the land and the condition of the place.

“Q. And what were his responses?

“A. Well, he said it was a good ranch. And I asked him why he wanted to sell it, and he said he had trouble with his eyes. He said the dust out there bothered his eyes, and he wanted to sell it so he didn’t have to go out there anymore.”

The witness Otto then related another conversation allegedly taking place in November of 1954, as follows (Tr., pp. 88-89-90-91):

“A. I asked him what the output of the well was, and he told me it was 2200 gallons per minute.

“Q. Were those the words he used?

“A. Yes. He said Jules Turner estimated the pump as throwing 2400 gallons per minute, but he said he didn’t think it was quite doing that. He said, ‘I think it is throwing 2200 gallons.’

“Q. Did he run the well on the land at that time?

“A. Yes.

“Q. He turned on the pump?

“A. Yes.

“Q. How long did it run?

“A. I would say 10 or 15 minutes, just a short while.

“Q. Did you make any observation as to the character of the water coming out of the pump?

“A. Yes.

“Q. What observation was that?

“A. Well, we seen the water coming out. Is that what you mean?

“Q. Well, did you notice anything about the water coming out of the pump?

“A. Yes, I noticed it was unusually dirty looking water.

“Q. Did you say anything to Mr. Shepard about that?

"A. Yes.

"Q. What did you say?

"A. I told him, I said, 'Boy, that is sure dirty looking water coming out of there.'

"Q. What did he say?

"A. He said, 'Yes, they all do that when you first start them up.'

"Q. Did Mr. Shepard make any other statements to you at this time about the capacity of the well, or its condition?

"A. Yes.

"Q. What were those statements?

"A. He told us the well and the pump, and everything was in good condition, that it was a gravel packed well, and it was in good condition.

"Q. Did you make any inquiry as to whether he had ever had any trouble with the well?

"A. Yes.

"Q. What did you ask him?

"A. I asked him if he ever had any trouble with his well.

"Q. And what did he say?

"A. He said, 'Well, we had a little trouble here.' 'But,' he said, 'you really couldn't class it as trouble.' He said that the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he said they ended up pulling the pump out of the hole, and found out everything was in good condition, and there was something wrong with the engine, and he had that taken care of.

"Q. Did he make any further statement to you about the previous history of the well?

"A. I don't believe he did.

"Q. Did he ever say anything about Mr. Cameron having gone back in the well?

"A. Yes.

“Q. And what was that statement?

“A. He told me that Mr. Cameron went back into the well, and they deepened that hole. I forget exactly how many feet, but he said from what depth to what depth that he went.

“Q. Did Mr. Shepard make any statement to you at this time about the tube capacity of the well?

“A. Yes.

“Q. What was that statement?

“A. He said it would handle 70 to 75 siphon tubes.”

Enlarging upon the foregoing conversations on cross-examination, the witness Otto testified as follows (Tr., p. 133):

“Q. Now, Mr. Shepard, at the time you were discussing this in September, said that the well was in good repair, is that right?

“A. Yes.

“Q. Did he tell you when he had last repaired it?

“A. Yes, he said when it was out of the hole they had repaired it.

“Q. That was in the preceding July and August?

“A. I forget. A short while before that.

“Q. It hadn't been very long?

“A. No.

The witness Haas also testified in regard to conversations between Otto, Haas and Elmer Shepard, as follows (Tr., pp. 266-267-268-269):

“Q. Mr. Haas, I think right now it would be better if you would confine yourself to the details leading up to the conversation with Mr. Shepard.

Did Mr. Shepard come up to your while you were on the property?

"A. Yes. We were there about 10, 15 minutes, when he come up, driving up in his pickup.

"Q. What happened then?

"A. Well, Ernie introduced me to him, and we got to talking about his ranch.

"Q. Did he at that time turn on the pump?

"A. Well, yes, we talked to him about possibly buying the place, but we says, well, we would like to see how this pump works, and how much water it throws. Therefore, he started the pump.

"Q. What was the appearance of the water coming out of the pump?

"A. To me it looker like a stream was coming out.

"Q. Did you notice anything about the water?

"A. Well, it was muddy, yes.

"Q. Did either you or Mr. Otto make any comment about that to Mr. Shepard?

"A. Ernie says, 'Gee, that water is muddy.'

"Q. Did Mr. Shepard make any response to that comment?

"A. He says, Yes, that is the way these desert pumps are.

"Q. Yes?

"A. And after you run them a while, it clears up.

"Q. Did Mr. Shepard at that time make any other comments or statements to you about the well on the property?

"A. Yes, I believe Ernest asked him how many gallons of water it was throwing, and he said one of them ranchers out there, I believe Turner is his name, had estimated that 2400 gallons a minute, but he said he estimated it at 2200.

"Q. Did he make any other statements about the well?

"A. Well, yes. We got to talking around there, and at that same time one of these, oh, I believe one of

them cotton pickers come up there, the mechanical cotton pickers, he was off a ways, and Ernie walked off a way to take a look at it, that was a different brand than he was running, and I says to Elmer, I said, 'Man, that sure looks desolate out there, all this desert. If there was no water out here, it wouldn't be worth anything.'

He said, 'Well, I'll almost bet my bottom dollar you've got enough water here for a cotton crop.'

"A. Yes, that was on the ranch there. Then I had also asked him, if this was such a good place, why he was willing to sell it.

"Q. And what was his response to that?

"A. Well, he told me he had quite a bit of trouble with his eyes, and that I believe he said he went to the Mayo Clinic about that. I am not sure, and had them examined, and that these doctors had told him to stay out of excessive dust, and that road out in this Harqua Hala Valley is tremendously dusty, and therefore he was trying to sell the place.

"Q. Did either you or Mr. Otto inquire as to any trouble he might have had with the well or pump?

"A. Yes, he asked him about trouble, and this and that.

"Q. And what did he state in response to that?

"A. He said he just had the ordinary trouble, the ordinary trouble.

"Q. Did he go into any detail?

"A. Not too much. He just said he had the thing fixed, and that is all I know about it."

Haas testified, additionally, about a second conversation at a motel in Buckeye, Arizona on the night of November 17th (Tr., p. 270), as follows:

"Q. Did Mr. Shepard make any statement to you about the condition of the well?

“A. He done that all along. I kept asking him all along. Naturally you would be worried about the water condition.

“Q. What was that statement?

“A. Well, he said the well was in perfect condition.”

The foregoing conversations, as elicited from the mouths of the plaintiff's witnesses, cannot be construed even in a light most favorable to the plaintiff as anything more than mere expressions of opinion.

2. *Its falsity.*

Were the foregoing statements attributed to the defendant Elmer Shepard false? The record reveals on the contrary that each and every statement attributed to him was true. Otto testified that Shepard, in referring to the capacity of the well, stated, “I think it is throwing 2200 gallons.” This statement, even as related by Otto, could be nothing more than mere opinion, and the record is devoid of any testimony indicating that Shepard did not, in fact, believe the truth of that allegation. However, comparing Shepard's alleged statement with those of other witnesses of the plaintiff, we find corroboration for his estimate. Plaintiff's witness Vern A. Tower, a salesman for State Tractor & Equipment Company, testified that he had estimated at one time the Shepard well would produce 2500 to 2600 gallons per minute. (Tr., p. 303). He additionally stated that after Shepard had the well repaired that the repair job brought the capacity of the well up again. (Tr., p. 301). He then modified this statement and stated that the well and pump produced a “fair head” of water. (Tr., p. 302). He additionally stated that after the last repair to the bowls on the pump, as follows:

“A. That is right. He was getting sufficient water for the crop, and he was very happy, and we were very happy he was happy.” (Tr., p. 304)

The plaintiff's witness Gordon Cameron, a well driller who lived in the area, testified that he had deepened the well in 1953, and made the following statement in regard to its capacity (Tr., p. 203) :

“Q. Did there seem to be any difference in the capacity of the well after you had deepened it, and the capacity before?

“A. Yes, it was a little better.”

He additionally testified as follows (Tr., p. 201) :

“A. I might explain, if the deepening job would go off like we had hopes it would. We had a lot of trouble trying to get circulation. We wanted to go to 1500, but we couldn't do it.

“Q. That was because there was too much water down at the bottom?

“A. No, we never could get circulation back.

“Q. You put mud down at the bottom?

“A. Yes.

“Q. And that kept washing way, is that correct?

“A. Yes.

“Q. When Mr. Rehnquist asked you if there was water in the hole, there was water for a considerable distance above 1000 feet, is that correct?

“A. Yes.

“Q. Where was the water level?

“A. I think it was right close to 200 feet.”

the above statement indicating clearly there was so much water in the well it was impossible to drill deeper. The defendants' witness Ernest Wood, who was an employee

of the well driller, Gordon Cameron, at the time complained of in plaintiff's complaint, testified that he was present with the witness Otto at the time the pump and well were first started up after Cal-Nine Farms exercised the option to purchase the property. His testimony was as follows (Tr., pp. 334-335):

"Q. After the deal was closed, did you have any occasion to assist Mr. Otto on the property?

"A. Yes, sir.

"Q. When was that?

"A. That was when he first started his pump."

"Q. Do you recall approximately when that was?

"A. That was in April of 1955.

"Q. Who started the pumps, Mr. Wood?

"A. I started the pump going myself.

"Q. Who laid out the tubes, if any were laid out?

"A. There were a number of tubes laid out, and I believe he and Ed laid them out, as far as I know. The tubes were laid out when I got there.

"Q. How many tubes were there?

"A. There was possibly 100 tubes, or better.

"Q. When you started up the pump, did it work?

"A. Yes, sir.

"Q. What did you do then?

"A. Let the water build up a little bit in the ditch, and started the tubes going.

"Q. How many did you start?

"A. 72.

"Q. Did you get them all running?

"A. Yes, sir.

"Q. Did you do any more that particular day, then?

"A. No, just told him, showed him, and tell him how the water was to go, and how it helped to watch

it. But he didn't stay. As I recall, he was gone, and he was very pleased with the well, and stood there and told me how proud he was of the place, which it is a nice place, very nice."

Under cross-examination by plaintiff's counsel, he reaffirmed this statement, as follows (Tr., pp. 342-343):

"Q. You had occasion to help Mr. Otto start the water in the spring of 1955?

"A. Yes, sir.

"Q. How long were you over there that first day?

"A. I was there long enough to start the pump and get the hose to running.

"Q. Give me some estimate of time.

"A. Probably three hours. When I got the hose to run I stayed around probably three hours.

"Q. It was ten days after that you came back?

"A. Yes, sir.

"Q. You weren't there at all in the intervening period?

"A. I was just across the fence several times, until I left Mr. Cameron and went over to Mr. Mas-singale's.

"Q. Could you see across the fence the number of tubes Mr. Otto had out?

"A. Yes.

"Q. About how far is that?

"A. From the fence to where his ditch was?

"Q. Yes.

"A. Approximately a couple hundred feet.

"Q. Did you say there was water going through 72 tubes?

"A. Yes, sir, two-inch tubes.

"Q. And did that continue for all of the three hours you were there?

"A. Yes, sir.

. . . .

and as follows (Tr., p. 344) :

“Q. When those 72 tubes started up, Mr. Wood, did you see any of them at all stop?

“A. Yes, sir.

“Q. How many of them?

“A. There was just a very few which they didn't let the water raise high enough in the ditch. They started to start the tubes a little too fast. Then you have always got to go and regulate your water, regardless.

“Q. Some of those tubes did start?

“A. Yes. I started them all, and they were all running.

“Q. Then they stopped after that?

“A. When I left, there was 72 tubes running.

“Q. They were all running water through them?

“A. Yes.

In regard to the defendant Shepard's statements as to the condition of the pump, the witness Lyman Miller, a mechanic and trouble shooter for the Arizona Engine and Pump Company, testified in regard to the repairs done on the pump in July, 1954, as follows (Tr., pp. 346-347-348) :

“Q. I have a statement here from State Tractor with regard to that work. That was the job you did, is that correct?

“A. That is right. We pulled it out and overhauled the bowls.

“Q. What was the nature of the work you did on that pump at that time?

“A. Well, we replaced the impellers and the shafting and the bearings in the bowl, and did some line shaft work on it.

“Q. You personally either did the work or oversaw it done, is that correct?

"A. I did the bowl work, yes.

"Q. All that work was done in your shop?

"A. Absolutely.

"Q. Who reinstalled it, then, in the well?

"A. At that time, State Tractor's boys.

"Q. And did you have occasion to see how it worked after it was reinstalled?

"A. I did.

"Q. Had you ever seen that well before, Mr. Miller?

"A. I had.

"Q. When did you first observe it?

"A. When it was new, first put in, and I installed it.

"Q. You had charge of the pump work at that time, too, is that correct?

"A. I wouldn't say in charge of it. I am more or less a troubleshooter for them, look after stuff like that.

"Q. Had you had other occasions in 1953-1954 to see that particular well?

"A. Yes.

"Q. You were familiar with it?

"A. Yes.

"Q. After the installation and repair work you did in July, 1954, did you see the well when it was turned on and the water pumping?

"A. Yes.

"Q. Was there a difference between the appearance of the water and its production at that time, and your other observations of it?

"A. Not that could be noticed.

"Q. Would you say that was a complete overhaul of the pump?

"A. Yes, I would say that was a complete job.

"Q. What actually is done to restore a pump in a case like that?

"A. It is pulled out, the line shaft checked, the bearings checked, and the bowls opened up. They are assembled, each bowl in itself is an assembly, and they are all pulled apart and inspected, and any parts that can be replaced up to as good as new is replaced.

"Q. Did you do that on this particular job?

"A. We did.

"Q. Were you satisfied with your work?

"A. Yes."

Plaintiff's witness Simcoe Walmsley testified he had seen the well the first of September, 1955, when Otto was running it and that it was a pretty good well (Tr., p. 285).

William Kimes, a service man for Arizona Engine and Pump Company, testified in regard to the pump that it was "it was in pretty good shape." (Tr., p. 351).

In regard to Shepard's statement in regard to the silting condition of the water pumped from the well, plaintiff's witness Gordon Cameron testified that while there was sand and silt in the Shepard well, it pumped plenty of water to irrigate Shepard's land (Tr., p. 201). The witness Cameron admitted it was a condition similar to that in his own well, but that there was a strong flow of water at the bottom of both his well and the Shepard well (Tr., p. 223), and that the silting condition would clear up (Tr., p. 213). The Court will recall that the plaintiff's witness Haas stated that he and Otto observed the silty condition of the water and remarked on it.

Shepard's statement as to the well having gravel in it was confirmed by plaintiff's own witness Cameron again (Tr., pp. 201-202).

Analyzing the testimony of Otto and Haas heretofore quoted to the Court, with citations, it is plain that Shepard

advised them the well had had work done on it to deepen it, that the bowls had been pulled and repaired and that the engine had had repairs, and yet it is on the basis of these facts, apparently, that plaintiff alleges it was defrauded.

3. *Its materiality.*

Plaintiff concedes that representations made to a purchaser who is unable to avail himself of the opportunity to investigate are usually material in a case based on fraud. In the instant case, however, plaintiff does not occupy such a position. It is defendants' contention that the statements attributed to Shepard were mere statements of opinion, for the most part, and therefore, could not be material in the sense that a representation is material. Defendants will discuss this in detail in item number 7 in regard to the reliance of the plaintiff, if any.

4. *The speaker's knowledge of its falsity or ignorance of its truth.*

Defendants refer the Court again to Argument under item 2 immediately above, which defendants contend substantiates the truth of the opinions stated by Shepard.

5. *His intent that it should be acted upon and in the manner reasonably contemplated.*

Has plaintiff shown that Shepard made the statements attributed to him with the intent that they should result in the plaintiff's purchase of the land in question? Defendants believe that the record is clear that the intent to purchase the land was not caused by any statements of Shepard, but was an independent agreement of the nine men who subsequently formed the Cal-Nine Farms Corporation, and that their intent to purchase became a reality long before

their representatives, Otto and Haas, ever contacted Shepard. In this regard, the Court is referred to the statements of the witnesses Otto and Haas, as follows—Otto testified on direct examination by counsel as follows (Tr., pp. 92-93):

“Q. Did you make any inquiries of anyone else regarding the well on this property?

“A. Yes.

“Q. Was this before the time you talked to Mr. Shepard in the conversation you just related, or after?

“A. Before.

“Q. Who else did you make inquiries of?

“A. I spoke to Gordon Cameron about it.

“Q. Does Mr. Cameron operate a ranch in that area?

“A. Yes, he is a neighbor, he adjoins me on the west, and he is also a well driller. And he deepened this well. That is the reason I questioned him, because I thought he knew about it.

“Q. When you say he adjoins you on the west, I take it before you bought the property, he would have adjoined Elmer Shepard on the west?

“A. Yes.

“Q. What inquiry did you make of Mr. Cameron?

“A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

“Q. And what did Mr. Cameron state to you?

“A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good.

“Q. Who else did you make inquiry of?

“A. Ed Swindle.

“Q. And who is Mr. Swindle?

“A. He is the manager of the Centennial farms.

"Q. And does he operate a ranch for Centennial Farms in that area?

"A. Yes.

"Q. What inquiry did you make of Mr. Swindle?

"A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything was.

"Q. And what did Mr. Swindle tell you in response to your inquiries?

"A. He told me about the same thing, that it was an awful good piece of land.

"Q. Did he say anything more than that?

"A. Well, we talked a lot. I can't remember the exact words we talked about. He just referred to it as a good place.

"Q. Did you shortly after the conversation you have described with Mr. Shepard in the middle of November enter into a written agreement with him?

"A. Yes."

In addition to the foregoing, the witness Otto on cross-examination was asked the direct question in regard to intent, as follows (Tr., pp. 126-127):

"Q. When did you first get the idea of buying the Shepard property?

"A. I would say it was sometime in October, the later part of October.

"Q. How did that come about?

"A. Gordon Cameron and Ed Swindle, I got to know pretty well, because I was working with them, and they told me, Why didn't I try to buy a ranch over here. They said, 'We need some more neighbors out here. We want to make this valley boom out here.'

"That is when I first got interested. They were telling me the Shepard place was for sale at that time.

"Q. It was not due to any solicitation from Mr. Shepard that you bought the property?

"A. No.

"Q. Was that the first you talked to Cameron and Swindle about the property, and what it would do?

"A. Yes."

The defendant Haas also indicated the intention to buy occurred prior to the conversation between Shepard, Otto and Haas, and stated under direct examination by his counsel, as follows (Tr., p. 265):

"Q. Did you have occasion to come to Arizona in 1954?

"A. Yes, I did.

"Q. When was that, do you remember?

"A. Well it was in November. I believe we left Fresno November 15th.

"Q. And did you come over with someone?

"A. Came over with Ernest Otto.

"Q. That is the Ernest Otto who has previously testified in the action?

"A. That is right.

"Q. What was the purpose of that trip to Arizona?

"A. Well, he come over there in, I believe it was the end of October, and he said he would like to maybe buy a ranch over here, that is, the fellows he was picking cotton for thought it was a good buy, and this and that, and he wanted to see about it, but he didn't have any money, I mean, actual cash, and a little short of it, so I says, well, maybe I can raise some. Therefore, I saw, oh, maybe a few of the fellows, four or five or six, and we decided, well, to put in a little money and help him buy it.

"Q. And the purpose of the trip to Arizona was to actually effect the purchase of this land?

"A. Yes.

"Q. Or of some land?

"A. Of some land, yes."

Under cross-examination, the witness Haas testified in regard to intent as follows (Tr., p. 272):

"A. Well, when Ernie first come over with a proposition of buy the place, why, I contacted these fellows, and then my other brother-in-law called the attorney, and asked him whether that thing would work all right that way.

"So we come over and picked up the Option, and then we went back and had a meeting right in the attorney's office.

"BY MR. BURCH:

"Q. In November?

"A. Yes."

.

and as follows (Tr., pp. 273-274):

"BY MR. BURCH:

"Q. When you came over with Mr. Otto, you already had your friends committed for the sum of \$80,000.00, hadn't you, you and Mr. Otto, and the other men altogether were committed to \$80,000.00, isn't that right, for the purchase of the land?

"A. I believe so.

"Q. You didn't have any other land in mind but Mr. Shepard's, did you?

"A. At what point are you referring to?

"Q. When you and Mr. Otto came over in November.

"A. You mean the very first time?

"Q. On the 17th of November, when you entered into the Option Agreement.

"A. Did I have any other land in mind, you mean?

"Q. You, or these eight men you testified went in with you to purchase this property.

"A. We just had in mind whatever Ernie had in mind, that is all I know.

"Q. And Ernie had told you he had a piece of property he wanted to buy for \$80,000.00, isn't that right?

"A. That is right.

"Q. And you had all agreed to go with him and buy it?

"A. Yes.

"Q. And you had already put up your earnest money, so to speak? You had that in your pocket, \$2,000.00?

"A. That is right.

"Q. You had already agreed at that time to purchase the land, hadn't you, among yourselves?

"A. Yes, if Ernie thought it could be bought, and that it was a buy.

"Q. That is right.

"A. None of the other fellows are farmers.

"Q. They all relied on Ernie, didn't they?

"A. That is right.

"Q. And you did, too?

"A. That is right."

. . . .

and as follows (Tr., pp. 274-275):

"Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

"A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

"Q. Mr. Otto had told you that?

"A. Yes.

“Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn’t he?

“A. I believe he was relying on this Gordon Cameron’s word quite a bit, his knowledge of the well.

“Q. He had made some thorough discussion—he had had a thorough discussion with Mr. Cameron, is that correct?

“A. That is what he said. That is all I know.

“Q. At the time you talked to Mr. Shepard, this had all been done, hadn’t it, the discussion with Mr. Cameron and the other investigation he made?

“A. I believe so.”

In regard to the purpose of the trip of Otto and Haas to the ranch, Haas again testified as follows (Tr., p. 275):

“Q. The only thing that remained to do was to try to close the deal with Mr. Shepard, isn’t that true?

“A. On my part. That was my part, yes, as far as I know.”

From the foregoing conversations, as related by plaintiff’s own witnesses, defendants contend that it is obvious that Otto and Haas and their seven co-investors in California made a decision to buy the Shepard ranch property before Otto and Haas contacted Shepard, and that Shepard’s relationship with them, as deducted from the testimony of Otto and Haas, cannot in any way be construed to show that his actions were deliberately calculated to influence the purchasers to buy the land in question.

6. *The hearer’s ignorance of its falsity.*

The defendants contend that a perusal of the record will clearly demonstrate that the defendant Elmer Shepard

made no false statements to the plaintiff corporation, inasmuch as the record shows it was not in existence at the time the alleged statements were made. Additionally, the defendants believe that the statements attributed to Shepard, and as set forth under the preceding five subsections immediately above, were in fact true and that the witnesses Otto and Haas, by separate investigation of their own, were aware of the true situation. This matter will be further discussed under sub-paragraph 7 following.

7. *His reliance upon its truth.*

Defendants have detailed to the Court the statements that plaintiff's witnesses attributed to the defendant Elmer F. Shepard upon which the allegation was founded. The record reveals that they were on notice that the water pumped out of the well was dirty when the pump was first started up (Tr., p. 89). Further, they were aware that Shepard had had some trouble with his pump (Tr., pp. 89-90), that the well had been deepened (Tr., p. 91), and Shepard's estimate of the gallonage being pumped from the well (Tr., p. 88).

Again referring to the statements of Otto and Haas, the record is replete with evidence that they did not rely on any statements of Shepard, but in fact, made investigations of their own, which were thorough and exhaustive, and on which, by their very own statements, they relied (Tr., pp. 274-275). At the risk of being repetitious, defendants wish to point out the following statements of the witnesses Otto and Haas to the Court in regard to this point. The witness Otto testified that before he ever made inquiry of the defendant Elmer Shepard in regard to the sale of the ranch, he had made inquiries of the witness Gordon Cameron in regard to the ranch (Tr., p. 92). Otto testified in court as follows (Tr., p. 92):

“Q. What inquiry did you make of Mr. Cameron?

“A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

“Q. And what did Mr. Cameron state to you?

“A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good.”

and also that he contacted another farmer in the area, as follows (Tr., p. 93):

“Q. What inquiry did you make of Mr. Swindle?

“A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything was.

“Q. And what did Mr. Swindle tell you in response to your inquiries?

“A. He told me about the same thing, that it was an awful good piece of land.”

Additionally, Otto testified that he had talked to Gordon Cameron's foreman, Woody, in regard to the production of water on the Shepard property (Tr., p. 127), and that he made an inspection of the property (Tr., p. 128). Otto also testified that he did not rely on the statements of Shepard, as follows (Tr., pp. 131-132):

“Q. You have already stated you could estimate reasonably the output of one of these wells, that is true?

“A. Yes.

“Q. And it was your estimate it was doing about 2000?

“A. Yes.

“Q. You didn't rely on his statement of 2200? You were relying on your own experience?

“A. I thought Elmer knew what he was talking about.

“Q. But you were relying on your own experience, weren't you?

“A. To a certain extent, yes.

“Q. You had also gone around and made inquiry as to what the well would do, in the way of capacity?

“A. Yes.

“Q. Did you rely on those statements made to you?

“A. Yes.

“Q. So it was not only the statements you got from Mr. Shepard, but also your own experience, and the statements of other persons that led you to believe it would do 2000 gallons?

“A. Yes.”

and Otto additionally testified that he was satisfied with his own investigation of the Shepard property and that he thought Mr. Shepard was stretching the truth when he made his estimate as to the capacity of the well, stating as follows (Tr., pp. 152-153):

“Q. You were not prevented in any manner from inspecting the property or the machinery and the equipment on it, were you?

“A. No.

“Q. And at the time that you and Mr. Haas entered into the Option Agreement with Mr. Shepard, you were satisfied with your own investigation of the property, were you not?

“A. Yes.

“Q. And you had relied on no one's statement of fact except your own investigation of what you could determine was true?

“A. No, I relied upon all the information I got from my neighbors, and everyone else.

“Q. From the neighbors?

“A. And Elmer Shepard.

“Q. Isn't it true when you had your conversation with Mr. Shepard in regard to the capacity of the well, you thought he was stretching it when he told you that there was 2200 gallons it would produce?

“A. I had an estimate close to 2000, but I figured he knew what he talking about. He owned the well.

“Q. My question was, you thought he was stretching it a little at that time, didn't you?

“A. Yes.”

The witness Haas, also testifying on behalf of the plaintiff, under cross-examination, as follows (Tr., pp. 274-275):

“Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

“A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

“Q. Mr. Otto had told you that?

“A. Yes.

“Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn't he?

“A. I believe he was relying on this Gordon Cameron's word quite a bit, his knowledge of the well.

“Q. He had made some thorough discussion—he had had a thorough discussion with Mr. Cameron, is that correct?

“A. That is what he said. That is all I know.

“Q. At the time you talked to Mr. Shepard, this had all been done, hadn’t it, the discussion with Mr. Cameron and the other investigation he made?

“A. I believe so.”

Additionally, Haas testified that Otto told him he had talked to people around the neighborhood about the condition of the place (Tr., p. 277), and further indicated that Otto was making a thorough investigation, as follows (Tr., p. 277):

“Q. Did Mr. Otto ever advise you he had talked to Woody about the water supply?

“A. He told me he had talked to people around the neighborhood about the condition of the place.

“Q. What did he tell you he had discovered about the water supply?

“A. He told me it sounded all right to him, but it seemed like he just couldn’t get to the bottom of it.”

The defendants’ witness Wood testified that he had met Otto prior to his conversations with Shepard (Tr., p. 328), and that he knew he was interested in purchasing property in the area and had several discussions with him (Tr., p. 329). Wood testified specifically as follows (Tr., p. 330):

“Q. Can you recall any of that specifically, when you discussed the wells?

“A. One afternoon we were sitting there at home, and we were talking about Mr. Cameron’s well.

“Q. Who is ‘we’?

“A. Mr. Otto and I. And talking about the wells, and he asked me about these pumps in these wells. He said he was not familiar with them, and he asked me if I was. And I told him I had seen a lot of them pumped in 20 years. He wanted to know

if it would go dry. I told him I hadn't seen any go dry yet. You never know. We discussed matters there, and I told him we had a little silt condition there at that particular place, and talked about gravel packing, and I even started the well for him.

"Q. That is Mr. Cameron's well.

"A. Yes, sir. And the well was started several different times during the fall, and he was there picking. I had a little alfalfa I had to water several times, and I had to start my motor every other morning, because after you get your regular drawdown of your well—I had an overhead tank for domestic use—so when you get your well drawn down the silt would start."

Wood further testified, as follows (Tr., pp. 331-332):

"Q. Did you ever discuss Elmer Shepard's well at any time with Mr. Otto?

"A. Yes, sir.

"Q. What, if anything, did you say to him with regard to that?

"A. He asked me, 'How is Elmer's well in comparison with this one?'

"And I said, 'No difference between the wells that I can see. I can't see any difference at all. However, Elmer's well will clear up a little faster than Gordon's will, the silt condition there.' "

Wood further testified that Ed Diebert, a brother-in-law of Otto's, took soil samples of the Shepard property to Mr. Otto in California (Tr., p. 332). This was confirmed on cross-examination of Otto on rebuttal (Tr., pp. 363-364), and Otto additionally admitted that the soil samples had been taken and the tests run prior to his conversations with Shepard (Tr., p. 364).

From the foregoing, it is defendants' belief that Otto and Haas entered into the option to purchase agreement

with the defendants Shepard upon the strength of their own investigation of the property and not upon the basis of any representations made to them by Elmer Shepard.

8. *His right to rely thereon.*

In view of the factual situation in the case, did the plaintiff corporation through Otto and/or Haas have a right to rely upon the alleged statements of Shepard? The Arizona Supreme Court, in the case of *Springer v. Bank of Douglas*, 313 P. 2d 399, Ariz., decided June 25th, 1957, says:

“If he has an equal opportunity to form and exercise a judgment of his own, it is presumed that he relied upon his own judgment. 23 Am. Jur., Fraud & Deceit, §§164-165. *Sorrells v. Clifford*, 23 Ariz. 448, 204 P. 1013.”

The court additionally cites the Arizona rule that a case of fraud cannot be based upon expressions of opinions, and in this respect, the Court is referred to the leading Arizona case of *Law v. Sidney*, 47 Ariz. 1, 53 P. 2d 64. In regard to the opportunity of the plaintiff to rely upon the defendant's alleged representations, the Supreme Court, in the foregoing case of *Law v. Sidney*, says:

“Where parties deal at arm's length and are on equal terms, one who has failed to avail himself of knowledge readily within his reach cannot claim any right to rely upon representations which he could have discovered to be false by the use of such knowledge. *Dianconi v. Smith*, 3 Ariz. 320, 28 P. 880, 26 C.J., p. 1150 and note.”

From the foregoing recitation of facts and the citations of the Arizona law applicable, defendants contend that plaintiff could not and did not have the right to rely upon any statements made by the defendant Elmer Shepard.

9. *His consequent and proximate injury.*

Defendants have maintained throughout the trial of the matter in the District Court and on this appeal that the only damage to plaintiff, if any, would be the difference between the value of the property if the defendants' representations had been true and the actual value of the property as it was when plaintiff received it. Defendants have heretofore cited to the Court the Arizona rule in this regard in Specification of Error No. 25, and will treat with the matter at length in Argument under paragraph number VII.

VII. Where One Has an Equal Opportunity to Make an Independent Investigation of Real Property for Purchase, It is Presumed He Relies on His Own Investigation Rather than Representations Made to Him by the Seller, and the Purchaser Cannot Say He Has Been Deceived to His Injury. (Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 20, 21 and 29.)

The foregoing proposition has been adopted both by the Supreme Court of the United States and the Supreme Court of the State of Arizona. In *Shappiro v. Goldberg*, 192 U.S. 232, 24 Sup. Ct. 259, 48 L.Ed. 419-425, the following language is employed by Mr. Justice Day, who delivered the opinion of the court:

“ . . . When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.”

In *Farrar v. Churchill*, 135 U.S. 609, 10 Sup. Ct. 771, 34 L.Ed. 246, a written memorandum was delivered to the real estate agent by the owner and exhibited to the prospective purchaser. The complainant, although insisting that he relied upon such memorandum, did visit the property and had an opportunity to examine it. The court dismissed his claim for relief, saying:

“ . . . If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied upon the vendor's representations.”

An examination of the record will reveal that the plaintiff's alleged agents, Otto and Haas, did make an investigation of their own and both of these witnesses admitted they were not prevented from making a thorough inspection of the property. In this regard, the Court is referred to the statements of Mr. Otto (Tr., pp. 152-153) and Mr. Haas (Tr. pp. 277-278). The Arizona citations are to the same effect, and the Court is referred to *Springer v. The Bank of Douglas*, 313 P. 2d 399, Ariz., *Wilson v. Byrd*, 288 P. 2d 1079, 79 Ariz. 302, and *Law v. Sidney*, 47 Ariz. 1, 53 P. 2d 64.

VIII. The Measure of Damages Sustained by a Purchaser Where a Purchase of Land Has been Induced by Fraud, Is, Under the Arizona Rule, the Difference Between the Real Value of the Property Purchased and the Value It Was Represented to Have. (Specifications of Error Nos. 11, 12, 15, 16, 17, 18, 22 and 25.)

The foregoing proposition has been repeatedly cited as the law by the Arizona Supreme Court in the following cases:

Wooley v. Locarnini, 18 Ariz. 539, 164 P. 319;
Curry v. Windsor, 22 Ariz. 108, 194 P. 958;
Ren v. Jones, 38 Ariz. 476, 1 P. 2d 110;
Hidalgo v. McCauley, 50 Ariz. 178, 70 P. 2d 443;
Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161.

In the *Lutfy* case cited above, the court stated that a proper element for consideration in arriving at the damages suffered, and a necessary element, was the value of the property the plaintiff purchased, and that failure to produce that value and to prove it in court was error. This is precisely the position of the defendants in the instant case. It is defendants' contention that there was no evidence as to the purported or represented value of the land sold, nor was there any evidence of the value that the land had upon the day when the contract was consummated. The only testimony as to damages was the amount of the cost of the new well (Tr., p. 107) and an estimate as to the loss of the cotton crop (Tr., p. 362 & 118). Under the Arizona Supreme Court's decisions, the cost of drilling a new well was not, in fact, a proper element to be considered in de-

“Q. Can you give us your opinion of the value of the property when Mr. Otto purchased it, in the condition it was?

“MR. REHNQUIST: Object again on the same grounds.

“THE COURT: Same ruling.

“MR. BURCH: If the Court please, I do believe the measure of damages is the difference between the actual value of the property received and the representations of the property value.

“THE COURT: All right, the Court ruled.

“MR. BURCH: That is all.”

Defendants contend that both counsel for plaintiff and the court were put on notice as to the correct measure of damages rule, as set forth by the Supreme Court of Arizona, and that despite this notice to both court and counsel, the court persisted in error.

Defendants point out the District Court's Minute Entry of November 23rd, 1956 [Order for Judgment] (Tr., p. 28), which reads as follows:

“It is Ordered that judgment will be entered for the plaintiff in the sum of \$35,106.40. Of this amount \$22,606.40 is the cost of a new well and the balance, \$12,500.00, is for crop damages.”

The court obviously ignored the Arizona rule on the measure of damages in arriving at its judgment and attempted to award damages on the “out-of-pocket” rule for damages, which the Arizona Supreme Court has specifically declared not to be the rule. *Lutfy v. R. D. Roper & Sons*, cited above.

IX. The Federal Court is Bound to Follow the Controlling Rules of Substantive Law as Declared by State Legislatures or the Highest State Courts in All Cases Based on Diversity of Citizenship Jurisdiction, Unless a Federal Constitutional or Statutory Question is Involved. (Specifications of Error Nos. 15, 16, 17, 18 and 24.)

Since the overruling of the doctrine of *Swift v. Tyson*, (1842), 16 Pet. (U.S.) 1, 10 L.Ed. 865, in the case of *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 82 L.Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487, the Federal courts must follow the state courts in regard to the measure of damages applied, fraud, parties plaintiff, and sufficiency of evidence. The United States Court of Appeals for the Ninth Circuit has followed this rule in the case of *New York Life Insurance Co. v. Rogers*, 126 F. 2d 784 (C.C.A. Ariz.). Defendants submit that the District Court failed to follow the proper measure of damages, as well as other particulars heretofore set out in this brief.

CONCLUSION

Appellants most respectfully reiterate that the District Court was bound to follow the rule set forth by the Arizona Supreme Court on such questions of substantive law as parties, fraud, burden of proof, and measure of damages. Appellants contend that the District Court failed in each of these categories to follow the controlling rules set forth by the Arizona Supreme Court in the cases heretofore cited. Plaintiff below failed to prove itself a proper party to the action, failed to sustain the burden of proof, and failed to show damages under the Arizona rule.

It is believed, therefore, that the judgment here upon appeal should be reversed with appropriate directions.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY FINNEY and EDWARD F. FINNEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF

FILED

1957

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TOPICAL INDEX

Page

Table of Authorities

ii

INTRODUCTION

1

I. THE MOTION PICTURES "STRANGE
HOLIDAY" AND "WHITE FURY"
BECAME WORTHLESS IN 1945 AND
PETITIONER WAS ENTITLED TO
DEDUCT THESE LOSSES IN 1945

4

A. "Strange Holiday"

4

B. "White Fury"

9

II. SUMS RECEIVED FROM THE FILM
"SENSATIONS OF 1945" CONSTITUTE
CAPITAL GAIN RATHER THAN
ORDINARY INCOME

11

A. Sale of a Partnership Interest

11

B. If Only Sale of Stock is Shown,
Reversal is Clearly Required

15

CONCLUSION

17

APPENDIX "A"

A-1

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boehm v. Commissioner, 326 U. S. 167	2, 3
Cahn v. Commissioner, (9th Cir. 1937), 92 Fed. 2d 674	3, 6, 10
Dobson v. Commissioner (1944), 320 U. S. 489	3
Haywood Lumber & Mining Co. v. Commissioner, (2nd Cir. 1950), 178 Fed. 2d 769	10
Lucas v. American Code Co., 280 U. S. 445	6
Niagara Share Corp. v. Commissioner, (4th Cir. 1936), 82 Fed. 2d 208	3, 6
Rhodes v. Commissioner, (6th Cir. 1939), 100 Fed. 2d 967	3, 6
United States v. S. S. White Dental Co., 274 U. S. 398	6

Statutes

26 U. S. C. A. 7482(a), (formerly 62 Stat. 991, §36)	3
---	---

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INTRODUCTION

The Brief for Respondent repeats the recital of facts almost verbatim from the statement by the Tax Court (Resp. Br. pp. 4-13). The Brief then again repeats part of the same recital as the introductory portions of its argument relating to the three questions on appeal (Resp. Br. pp. 16-17; 22-24; 26-31). However:

(1) The statement of the evidence in the record dealing with the films "Strange Holiday" and "White Fury" contained in Petitioners' Opening Brief is not quarrelled with

(see "Detailed Statement of the Facts", Pet. Op. Br. pp. 34-37; 41-43); and,

(2) Similarly, the "Detailed Statement of the Facts" dealing with Andrew Stone Productions and the problem of capital gain in Petitioners' Opening Brief (Pet. Op. Br. pp. 7-10) is not asserted to be inaccurate in any detail, though Respondent vigorously does attack petitioners' argument that a sale of a partnership interest is shown thereby (Resp. Br. pp. 32-35).

We mention the above not as a preface to still another review of the evidence or statement of the findings of the Tax Court, but because we wish to emphasize that a question of law is here involved. Not a single one of the many authorities relied on by Petitioners in their Opening Brief is questioned anywhere in the Brief for the Respondent. Indeed, only one of the numerous cases cited by Petitioners is even mentioned in Respondent's Brief. This is Boehm v. Commissioner, 326 U.S. 167 (Resp. Br. pp. 18-19), on which Respondent relies to preclude effective review by this Court of the Tax Court's determination that Petitioner had not established his claimed losses for 1945.

As stated in our Opening Brief (p. 37), we are aware that the question of loss is primarily a factual one. The statement of this rule, however, does not operate automatically in an Appellate Court to require the imprimatur of affirmance.

In the final analysis the sufficiency of the evidence to support a purported finding of fact by any administrative or judicial body is nevertheless a question of law. A finding of fact made without any supporting evidence -- even a finding of fact that no loss was sustained in a particular year -- is not to be saved by incantation of the rule in the Boehm case. An appellant is entitled, nevertheless, to a consideration of his precise arguments on their merits and to a determination of whether the Tax Court's findings are supported by substantial evidence in the light of the whole record. 1/

In each of the following cases, each of which was cited in our Opening Brief, findings of fact that no loss was sustained in a particular year were reversed by the reviewing Courts:

Cahn v. Commissioner, 92 Fed.2d 674
(9th Cir. 1937)

Rhodes v. Commissioner, 100 Fed.2d 967
(6th Cir. 1939)

Niagara Share Corp. v. Commissioner,
82 Fed.2d 208 (4th Cir. 1936)

1/ The Act of June 25, 1948, c. 646, §36, 62 Stat. 991 (§1141(a) of the 1939 Internal Revenue Code as amended, and now 26 U.S.C.A. 7482(a) of the 1954 Code) legislatively overrode the rule of Dobson v. Commissioner, 320 U.S. 489 (1944), which had operated automatically to affirm findings of the Tax Court. The Statute now provides in pertinent part: "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; ... "

THE MOTION PICTURES "STRANGE
HOLIDAY" AND "WHITE FURY" BECAME
WORTHLESS IN 1945 AND PETITIONER
WAS ENTITLED TO DEDUCT THESE
LOSSES IN 1945

A. "Strange Holiday"

We must take issue with Respondent's statement that Petitioner did not testify that "Strange Holiday" became worthless upon cessation of hostilities and that the only evidence thereof was his "own vague self serving testimony" (Resp. Br. p. 21). At page 84 of the Transcript of Record is the following:

"THE WITNESS: I believe it was 1943, your Honor, and we engaged Mr. Oboler to make certain changes so that the film would be qualified for general presentation in the theaters, and just about the time that -- we had had a couple of showings on it, and as your Honor knows, in the latter part of 1945, hostilities ceased and we then tried to sell the film, and submitted it to several different people, and all of them felt that because the war was over, and because of its particular theme, and the citizens of the United States had had four years of incessant war, that they had had plenty and they felt that there was absolutely no

chance to sell this film at all."

At pages 92, 93, 126 and 127 he also testified to the efforts made to obtain distribution of the film after the war, all without success. 'This testimony was specific and definite, naming names and stating facts. There is no contradictory evidence in the record thereto. We submit that it must be controlling here, especially as Petitioner's utter candor and truthfulness with the Court is apparent on every page of the Record.

We must also take issue with Respondent's assertion that Petitioner's testimony "also indicates that he had a continuing intention to exploit it ["Strange Holiday"] for profit if he could" (Resp. Br. p. 22). Petitioner testified categorically (R. pp. 122-125) that no attempts were made to sell the film in 1946 or 1947, "that we practically abandoned the picture in '45", that "I would say that no effort was made at all," and "... when I wrote it off in 1945, I just took it as a dead loss and figured that was the end of it, ... "

Respondent also states: "If the value of the picture depended upon the public mood, as taxpayer seems to contend, that fact may well have been reflected in the low price for which he acquired it" (p. 21). The difficulty with this thought, however, is that the film was clearly worth something when it was acquired, and that Petitioner acquired the film in 1943, more than two years before the subsequent termination of hostilities rendered it worthless.

Finally, Respondent states, "The fact that he sold it for \$2,100 in 1951 leaves little merit to his contention that it became valueless in 1945" (p. 22). Here, at least, we would have thought that Petitioners' authorities would be grappled with. But Respondent's Brief simply ignores Cahn v. Commissioner, 92 Fed.2d 674 (9th Cir. 1937), and Rhodes v. Commissioner, 100 Fed.2d 966 (6th Cir. 1939), which clearly hold that subsequent recovery does not prevent proof of loss in a prior year (Pet. Op. Br. p. 40). (The alleged "confidence" of the chance purchasers in 1951 of course is immaterial to the problem, especially as they bought the film as stock material, not as a picture itself. See R. 131.)

The Supreme Court has pithily stated, "The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test." Lucas v. American Code Co., 280 U.S. 445, 449. Under this test, the taxpayer is not required to be "an incorrigible optimist". United States v. S. S. White Dental Co., 274 U.S. 398, 403, and cases cited Petitioners' Opening Brief, p. 38. A practical test on this record, which is the test Petitioner himself applied at the end of 1945, requires a finding that "Strange Holiday" became worthless in 1945. See cases cited above page 3. Rhodes v. Commissioner, 100 Fed.2d 966 (6th Cir. 1939), is particularly apt. There the taxpayer purchased two parcels of land in 1925. Hurricanes in 1926 and 1927 and the

Florida depression rendered the parcels, in his opinion, worthless. As to the first parcel the Court stated:

"After the second hurricane, the petitioner concluded the property was worthless as he could find no purchaser for it and refused to make further payments under his purchase contract, sought to abandon it and charged off of his books of accounts as a loss the sum of \$15,762.50 which he had paid and deducted this amount as a loss from gross income in his income tax return for 1927."

In 1928, as the result of an unsolicited cash offer, he sold the first parcel for \$1,000 or \$1,100. He still had title to the other parcel in 1928, the purchase contract to which he had abandoned in 1927 and as to which he had taken a loss of \$28,875.00 in 1927. The Tax Court denied the loss deductions. The Court of Appeals reversed. At page 970, the Court stated:

"The small sum received by petitioner in 1928 is not persuasive evidence that the property had any substantial value in 1927. He originally contracted to pay \$20,000 for the lot. The receipt of one-twentieth of this sum in 1928 proves it was practically worthless prior thereto.

The fact that a taxpayer recovers a small part of a loss in a subsequent year does not invalidate

it as such when its deduction in the year taken was based on the exercise of reasonable judgment from facts then known. United States v. S. S. White Dental Mfg. Company, 274 U.S. 398, 403, 47 S.Ct. 598, 71 L.Ed. 1120. Such recovery becomes a part of gross income the year of receipt. Burnett, Commissioner, v. Sanford & Brooks Company, 282 U.S. 359, 367, 51 S.Ct. 150, 75 L.Ed. 383; Cooper v. United States, 8th Cir. 9 Fed.2d 216.

The hurricane in 1926 and its recurrence in 1927, the collapse of land speculation in Florida in 1927, the petitioner's unsuccessful effort in 1926 to sell the property continued in 1927 with the same result, and his complete abandonment and charging off of his books of the property in 1927 were identifiable events that established the loss in that year. ...

...

... If its amount and the year of its occurrence is factually reasonably ascertainable, it is allowable. The petitioner's claimed losses meet this test. The Board's findings are not supported by substantial evidence and its order is reversed."

In the instant case the end of the war and the change in public temper served to outmode the film "Strange Holiday" and render it worthless as shown by the wholly unsuccessful attempts to market it made by the petitioner and those in the industry to whom he turned.

B. "White Fury"

A pivotal fact here in Respondent's opinion seems to be "When a seizure of the negative in the agent's possession was threatened, the taxpayer instructed his agent to resist such action" (Resp. Br. pp. 7 and 24).

The record on the point, however, shows that his efforts to get his agent to resist were utterly worthless, and that this was properly one of the reasons for his abandoning the film in 1945. 2/

2/ "Q. Did you advise these English people not to oppose the seizure of this film by the Swedish authorities?

A. I tried to have them oppose it, but it didn't do any good.

Q. I didn't hear the answer.

A. I tried to have them oppose it, but it didn't do any good.

Q. How long did you continue to urge this opposition?

A. When the Swedish people got out an injunction and clamped down on the negative, which was in a laboratory in England, that was the end of all operations as far as the picture was concerned.

Q. The seizure did not occur until 1946.

A. The actual possession of the film perhaps was in '46 but the closing down on it, I believe, was in '45."

(R. 150-151.)

In almost the same breath, Respondent then damns Petitioner because he did not continue his efforts to recover his film (Resp. Br. pp. 24-25). We submit that Respondent cannot have it both ways: If Petitioner is to be denied a loss deduction in 1945 because he did not abandon his efforts to resist his adversary, it cannot at the same time be argued that he must be denied the loss deduction because he did not continue to exhaust all possibility of recovery (Resp. Br. pp. 24-25). Again a practical test is required. As shown by the cases cited on pages 45-47 of Petitioners' Opening Brief, none of which are even mentioned in Respondent's Brief, Petitioner here was entitled to, indeed, had to, take his loss in 1945. This is especially apparent when it is recalled that his attorney, a recognized authority in motion picture law, (Harold A. Fendler), advised him that he could not prevail in any litigation over the title to the film, that he was faced with long and expensive litigation if he contested the Swedish firm, and that the best thing to do was to abandon the project, as he had no rights (R. 100-101, 134, 140-141). Certainly under a practical test the taxpayer was well advised to rely upon the advice of his counsel.

Cahn v. Commissioner, 92 Fed.2d 674, 676
(9th Cir. 1937)

Haywood Lumber & Mining Co. v. Commissioner,
178 Fed.2d 769 (2nd Cir. 1950)

This is especially apparent when it is realized that if there was

any chance of prevailing against the Swedish firm, it would have been to Petitioner's advantage to litigate the matter: he had more to gain from exploiting "White Fury" than from taking a loss in connection therewith.

II.

SUMS RECEIVED FROM THE FILM "SENSATIONS OF 1945" CONSTITUTE CAPITAL GAIN RATHER THAN ORDINARY INCOME

A. Sale of a Partnership Interest

(Ref. Resp. Br. pp. 26-36.)

We are willing to let the record speak for itself as to whether a partnership or joint venture between Petitioner and Stone and Jackson is shown by his testimony pro se. We believe such is clearly shown.

We must, however, specifically dispute Respondent's contention that the record is "devoid of any definite evidence concerning a 'valuable distribution agreement' " (Resp. Br. p. 33). The record clearly shows that Petitioner, Stone and Jackson considered the distribution agreement an asset of considerable value, as, indeed, such a contract is to independent picture producers. The record contains the following:

"Q. Can you state if it ["Hi Diddle Diddle"]
was released about August 20, 1943?

A. That was about the time of the release, yes, sir.

Q. It had a distribution agreement with United Artists?

A. Yes, we did.

Q. Then was this distribution agreement transferred to Andrew Stone Pictures or assigned, as we say in legal circles, in all matters except High Diddle Diddle production?

A. You mean when he formed another corporation?

Q. That is right.

A. I don't know exactly what happened after that because if you will notice from my testimony and some of the correspondence when we came to a disagreement, I had no further connection with the company and didn't know how they operated frankly, but I presume they must have turned title over to Andrew Stone Corporation. " (R. 154.)

The record also shows that Petitioner personally had an element of control over or value in this distribution agreement:

"Q. Why couldn't you have been excluded from Productions by a dissolution and liquidation, which assets would have been distributed, and then a new corporation formed in which you were not a

stockholder?

A. I don't think United Artists would have been a party to that because I don't believe they would do business that way.

Q. Could you explain that.

A. The man that was the head of it was a man by the name of Edward Rafferty who was a lawyer, and I think he was a pretty honorable person, and that would have been eclipsing me, who had helped get the thing started as well as Stone." (R. 162)

* * *

"A. ... I had spent a lot of time in this project and felt it did have a future, and I had always wanted to have a United Artists release myself and was unable to get it alone. With Stone, I was able to do it.

I knew some of the officials at United Artists because years before, I had worked for them as an advertising man, and I know they were pleased to see me get into this proposition.

Then we came to a disagreement. They were anxious to see some kind of a happy settlement effected, but as I say, I could come to no terms at all with Stone, and finally we had to get his lawyer to sit down with the two people I had, and this was the agreement that

resulted." (R. 168)

During the trial the Government itself acknowledged that the distribution agreement was of value and that Petitioner himself had a claim to it, as note the following remarks by the Government attorney:

"MR. WHITE: . . .

The fact that he [Stone] was able to obtain United Artists distribution agreement is some indication of his merit.

There is also this other item, this United Artists release, which was so valuable in which Mr. Finney apparently had some rights on. It might have been on its face an agreement between United Artists and Mr. Stone, but he apparently had some rights to this, and maybe by agreement by Andrew Stone and by Andrew Stone Productions to which Mr. Andrew Stone assigned this distribution agreement." (R. 176. See also R. 165 and 168.)

We must also directly dispute the Respondent's statement that by the agreement of September 23, 1943 (Appendix A to Pet. Op. Br.) the Petitioner "also gave up any right to future salaries" (Resp. Br. p. 35), as the testimony was categorical that Petitioner had a right to salary only for his work on the film "Hi Diddle Diddle" and not with reference to

uture films. (R. 159. Respondent in effect concedes as much on the bottom of page 32 of Resp. Br.) There is, therefore, no basis for any holding or conclusion that the moneys received from "Sensations of 1945" was in lieu of a right to salary and therefore constitute ordinary income.

B. If Only Sale of Stock is Shown, Reversal
Is Clearly Required

(Ref. Resp. Br. pp. 36-40.)

Respondent concedes that the Tax Court's ultimate finding "certainly is confusing and contradictory to say the least" (Resp. Br. p. 36). Respondent then speculates that "It seems more probable that the words 'do not' were inadvertently omitted following 'Sensations of 1945' in the final promulgation of this part of the Tax Court's findings and opinion" (Resp. Br. p. 37). Apart from the fact that Respondent's speculation is not convincing, we do not believe it is appropriate here. The ultimate finding remains clear and unambiguous and does not support the Tax Court's conclusion (see Pet. Op. Br. pp. 22-23).

Our position on this is fortified, we respectfully submit, by the express premise on which the Government tried the case and on which the Tax Court based its ruling; namely, that Petitioner's shares of stock could not be given a value greater than a 20% interest in "Hi Diddle Diddle". Possibly for this

reason, the Government conceded that moneys received by Petitioner from "Hi Diddle Diddle" constituted capital gain. As we have shown on pages 25-32 of Petitioners' Opening Brief, however, the theory is absolutely fallacious, though it still appears to be the Government's contention. At page 30, Respondent's Brief states:

"No other picture had been started, and so far as the record shows, this film ["Hi Diddle Diddle"], or the proceeds to be realized from it, represented the entire value of the capital stock of Productions at the time the taxpayer purportedly sold his 20 shares to the corporation. "

Apart from the above bald assertion Respondent does not attempt to uphold the theory but is simply content with the assertion that the record does not support that the theory was relevant to the Tax Court's opinion (Resp. Br. p. 39). We are content to rely on the record which is now before this Court. We have gathered in Appendix "A" hereto some of the matter from the record that shows that the Government's theory of the case, throughout, was that the value of Petitioner's stock could only be a 20% interest in "Hi Diddle Diddle". The record also shows that this was the Tax Court's belief too. (E. g. see R. 170, 172, 189-192.)

CONCLUSION

The three questions before this Court are separate and distinct and unconnected except that they all relate to Petitioner's 1945 tax return. Even Respondent has conceded the contradictory nature of the ultimate finding dealing with moneys received from "Sensations of 1945". In Petitioners' view, the case must clearly be reversed with respect to the Tax Court's determination that such moneys were ordinary income. Further in Petitioners' view, the Tax Court's determination that losses were not shown to have been sustained in 1945 with reference to the films "Strange Holiday" and "White Fury" also cannot be sustained. Petitioners therefore respectfully urge a reversal on all the specifications of error made in Petitioners' Opening Brief.

Respectfully submitted,
PAUL P. SELVIN and
IRVING ROGOSIN,
Attorneys for Petitioners.

APPENDIX "A"

Extracts from Record Showing Government's
Theory to Be That the Value of Petitioner's
Stock Could Only Be a 20% Interest in "Hi
Diddle Diddle".

"Q. To try to clarify this matter, I will first ask the question generally, and then go into more figures in this agreement which is in evidence as exhibit 2.

You were a 20 per cent stockholder in Andrew Stone Productions.

A. That is right.

Q. At the time of this agreement of September 23rd, Andrew Stone Productions had no assets other than the motion picture High Diddle Diddle.

A. Correct.

Q. Had the motion picture been exhibited at that time?

A. It had not, sir.

Q. So the only value of Andrew Stone Productions, Incorporated was the value of High Diddle Diddle, subject, of course, to liabilities.

A. Yes.

Q. Pursuant to an agreement, you received a 20 per cent interest in High Diddle Diddle, in the proceeds of High Diddle Diddle. You received a 20 per cent interest.

A. I had a 20 per cent interest from the beginning.

Q. Pursuant to that agreement of September 23rd, it provided that you were to receive 20 per cent of the net profits of High Diddle Diddle.

A. Yes.

Q. In addition, it provided that you were to receive 12 per cent of three additional pictures which may be made by Andrew Stone and Frederick Jackson.

A. Yes, sir.

Q. In addition, you were to receive certain lump sums from each picture.

A. Yes, sir.

Q. I think the Court asked yesterday, why, if all you had was a 20 per cent interest in Andrew Stone Productions, were they willing to give you these percentages and lump sums over the 20 per cent of High Diddle Diddle?" (R. T. p. 160, l. 3 - p. 161, l. 12.)

* * *

"MR. WHITE: Your Honor, to clarify it a little, I think what happens is that Productions is dissolved and all it had to distribute to its stockholders was an interest in the proceeds of High Diddle Diddle." (R. T. p. 165, l. 2 - l. 5.)

* * *

"THE COURT: What is the Government's theory of treating this as ordinary income?

MR. WHITE: The Government's theory is that he didn't sell stock; that he sold other things as well as income, such as rights to salary, other rights that he may have had against these individuals.

THE COURT: Any theory that these payments might have been dividends?

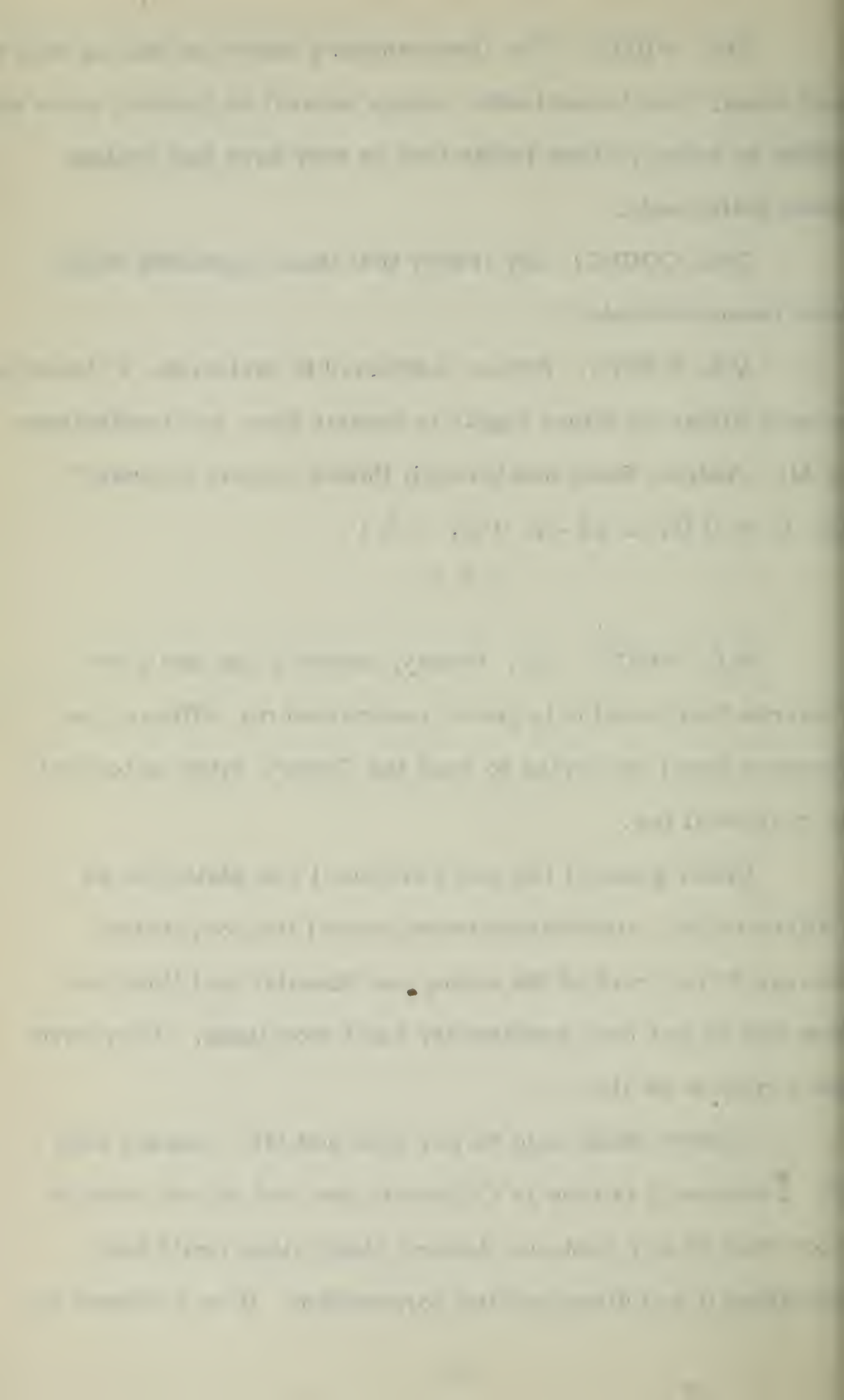
MR. WHITE: Not so restricted to dividends. Primarily as sole rights or future rights to income from any productions by Mr. Andrew Stone and through United Artists release. "
(R. T. p. 175, l. 22 - p. 176, l. 7.)

* * *

"MR. WHITE: Mr. Finney, maybe I can add a few remarks that would help you to understand my difficulty and presume that I am trying to read the Judge's mind as to what is in general law.

Under general law and I believe I can state this as California law, stockholders who control the corporation through 80 per cent of the voting can dissolve and liquidate. Now that 20 per cent stockholder can't stop them. They have got a right to do that.

Andrew Stone held 60 per cent and Mr. Jackson held 20. I believe it is true in California law that all you need is more than 50 per cent, so Andrew Stone alone could have liquidated it and dissolved the corporation. If he had done so,



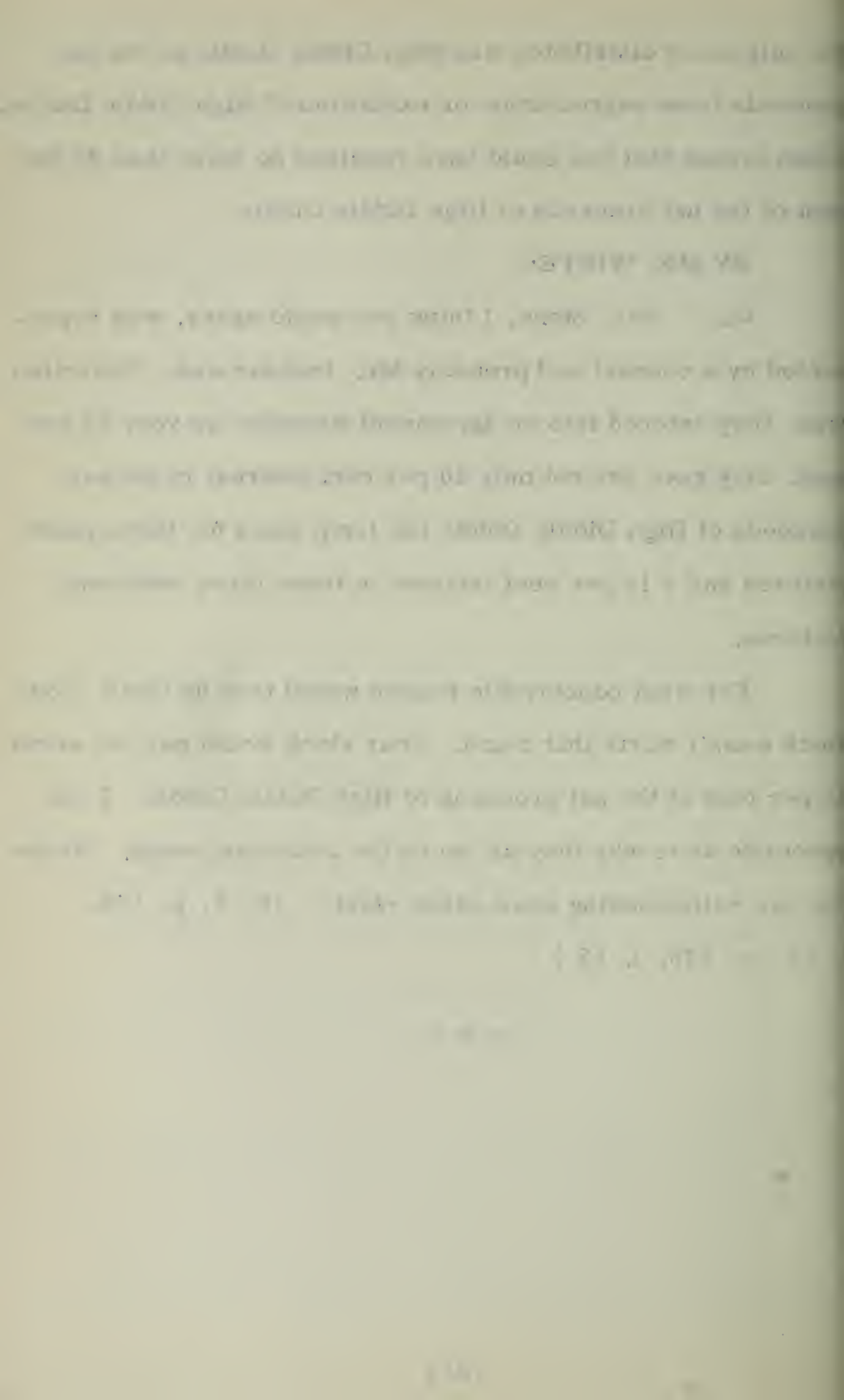
the only asset distributed was High Diddle Diddle or the net proceeds from reproduction or exhibition of High Diddle Diddle, which means that you could have received no more than 20 per cent of the net proceeds of High Diddle Diddle.

BY MR. WHITE:

Q. Mr. Stone, I think you would agree, was represented by a counsel and probably Mr. Jackson was. Nevertheless, they entered into an agreement whereby for your 20 per cent, they gave you not only 20 per cent interest in the net proceeds of High Diddle Diddle but lump sums for three more pictures and a 12 per cent interest in these three additional pictures.

For what conceivable reason would they do that? Your stock wasn't worth that much. Your stock would only be worth 20 per cent of the net proceeds of High Diddle Diddle. I can speculate as to why they did so on the additional sums. Maybe you are relinquishing some other right." (R. T. p. 178, l. 14 - p. 179, l. 15.)

* * *



No. 1 5 6 0 0

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY FINNEY and EDWARD F. FINNEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF

FILED

SEP 20 1957

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TOPICAL INDEX

	<u>Page</u>
JURISDICTIONAL FACTS	1
CONCISE STATEMENT OF THE CASE	3
SPECIFICATION OF ERRORS	5
ARGUMENT	7

I.

MONEYS RECEIVED FROM THE FILM SENSATIONS OF 1945 CONSTITUTE A CAPITAL GAIN RATHER THAN ORDINARY INCOME	7
---	---

A. Detailed Statement Of The Facts	7
B. The Transaction Shown Is An Arms Length Divestment of Petitioner's Interest In Productions and In His Joint Venture with Stone and Jackson	10
C. The Sale Of A Partnership Interest Is The Sale Of A Capital Asset And The Proceeds Thereof Constitute a Capital Gain and Not Ordinary Income	16
D. Even Assuming That Petitioner Has Shown Only The Sale of Stock in Productions and Not a Sale of a Partnership Interest in Addition, The Moneys Received From The Film SENSATIONS OF 1945 Constitute A Capital Gain Rather Than Ordinary Income	22

II

THE MOTION PICTURE "STRANGE HOLIDAY" BECAME WORTHLESS IN 1945 AND PETITIONER WAS ENTITLED TO DEDUCT THIS LOSS IN 1945	34
---	----

A.	Detailed Statement of the Facts	34
B.	The Record Clearly Shows the Loss To Have Occurred in 1945	37

III

THE MOTION PICTURE "WHITE FURY" BECAME WORTHLESS IN 1945 AND PETITIONER WAS ENTITLED TO DEDUCT THIS LOSS IN 1945	41
---	----

A.	Detailed Statement of the Facts	41
B.	The Record Clearly Shows The Loss To Have Occurred in 1945	44

CONCLUSION	47
------------	----

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Alison v. United States, 344 U. S. 167	37, 46
Boehm v. Commissioner, 326 U. S. 287	36
Borden v. Commissioner, 101 Fed. 2d 44	46
Burnet v. Logan, 283 U. S. 404	19, 22
Burnet v. Sanford Brooks Co., 282 U. S. 359	45
Cahn v. Commissioner, 92 Fed. 2d 674	38, 40, 47
Commissioner v. Burnett, 118 Fed. 2d 659	23
Commissioner v. Carter, 170 Fed. 2d 911	19, 21
Commissioner v. Highway Trailer Co. 72 Fed. 2d 913	38, 45
Commissioner v. Hopkinson, 126 Fed. 2d 406	20
Commissioner v. John Thatcher & Son 76 Fed. 2d 900	38, 45
Commissioner v. Shapiro, 125 Fed. 2d 532	16
Commissioner v. Smith, 173 Fed. 2d 470	16
Commissioner v. C. A. Spori & Co. 118 Fed. 2d 283	23
Elsbach v. Mulligan, 58 Cal. App. 2d 354, 136 P. 2d 651	17
First National Corporation v. Commissioner, 147 Fed. 2d 462	40
Foster v. Keating, 120 Cal. App. 2d 435, 261 P. 2d 529	17
Haywood Lumber and Mining Co. v. Commissioner, 178 Fed. 2d 769	47
Hillman v. Hillman Land Co., 81 Cal. App. 2d 174, 183 P. 2d 730	17

Dudley T. Humphrey, 32 B. T. A. 280	17
Lucas v. Amer. Code Co., 280 U. S. 445	39
McClellan v. Commissioner, 117 Fed. 2d 988	16
Niagara Share Corp. v. Commissioner, 82 Fed. 2d 208	38, 45, 46
George James Nicholson, 3 T. C. 596	20
Rhodes v. Commissioner, 100 Fed. 2d 966	40
Swiren v. Commissioner, 183 Fed. 2d 656	19
U. S. v. Shapiro, 178 Fed. 2d 459	16
U. S. v. S. S. White Dental Co., 274 U. S. 398	38, 47
U. S. v. Yerger, 55 Fed. Supp. 521	20, 21
Westover v. Smith, 173 Fed. 2d 90	20

Statutes and Texts

Civil Code, §§399-404c	26, 27, 29, 30
1939 Code §23(E)	37, 44
1939 Code §115(c)	20
G. M. C. 26379, 1950-1 Cum. Bull. 58	17
Internal Revenue Code §117	17
Internal Revenue Code §7482 (26 U. S. C. 7482)	2
U. S. Treasury Reg. 111, §29.23(e) 1(b)	41, 44
N. Y. U. 6th Annual Institute on Federal Taxation (1947)	22

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PETITIONERS' OPENING BRIEF

JURISDICTIONAL FACTS

On January 16, 1957, the Tax Court of the United States rendered its decisions in T. C. Docket Nos. 51010 and 51011 (* R. 48, 49). These determined, respectively, that petitioner Betty Finney was liable for deficiency in her income taxes for the year 1945 in the amount of \$3,938.98 and that petitioner Edward F. Finney was liable for deficiency in his

* Transcript of Record.

income taxes for the year 1945 in the amount of \$3,863.98. 1/

Petitioners are husband and wife who under the community property law provisions filed separate tax returns for the year in question (R. 74). The two cases had been consolidated in the Tax Court (R. 73), and petitioners on April 3, 1957, filed herein a joint Petition for Review of Decision and Order of the Tax Court (R. 50). Petitioners are citizens of the United States and reside in Los Angeles, California; their federal income tax returns which are here involved were filed with the Commissioner of Internal Revenue for the Sixth District of California, in Los Angeles, within the jurisdiction of this Court.

Jurisdiction of this Court to review the decisions of the Tax Court herein is founded on §7482 of the Internal Revenue Code (26 U. S. C. 7482).

Petitioners have been granted leave to file typewritten briefs.

1/ Though an alleged deficiency in each petitioner's income tax for the year 1944 was also originally in issue in the Tax Court, respondent ultimately conceded and the Tax Court decided that there was no deficiency in petitioners' taxes for 1944 (R. 48, 49). The proceedings before the Tax Commissioner and in the Tax Court are summarized in the Petition for Review, R. 51.

CONCISE STATEMENT OF THE CASE

For convenience the husband Edward F. Finney is hereafter referred to as the petitioner. Said Finney was engaged in various phases of the motion picture industry and his income and losses are reflected in both returns and are in issue here.

The petition (R. 50) raises the question of the correctness of the assessment of a deficiency of \$3,863.98 in petitioner's 1945 income tax returns. The assessment rests on three separate items in petitioner's 1945 return. The Tax Court upheld the Commissioner's contention on each item. For convenience and in compliance with Rule 18 the general nature only of the resulting three questions is here set forth. A detailed statement of the facts concerning each question with appropriate record references precedes each legal argument. (See *infra*.)

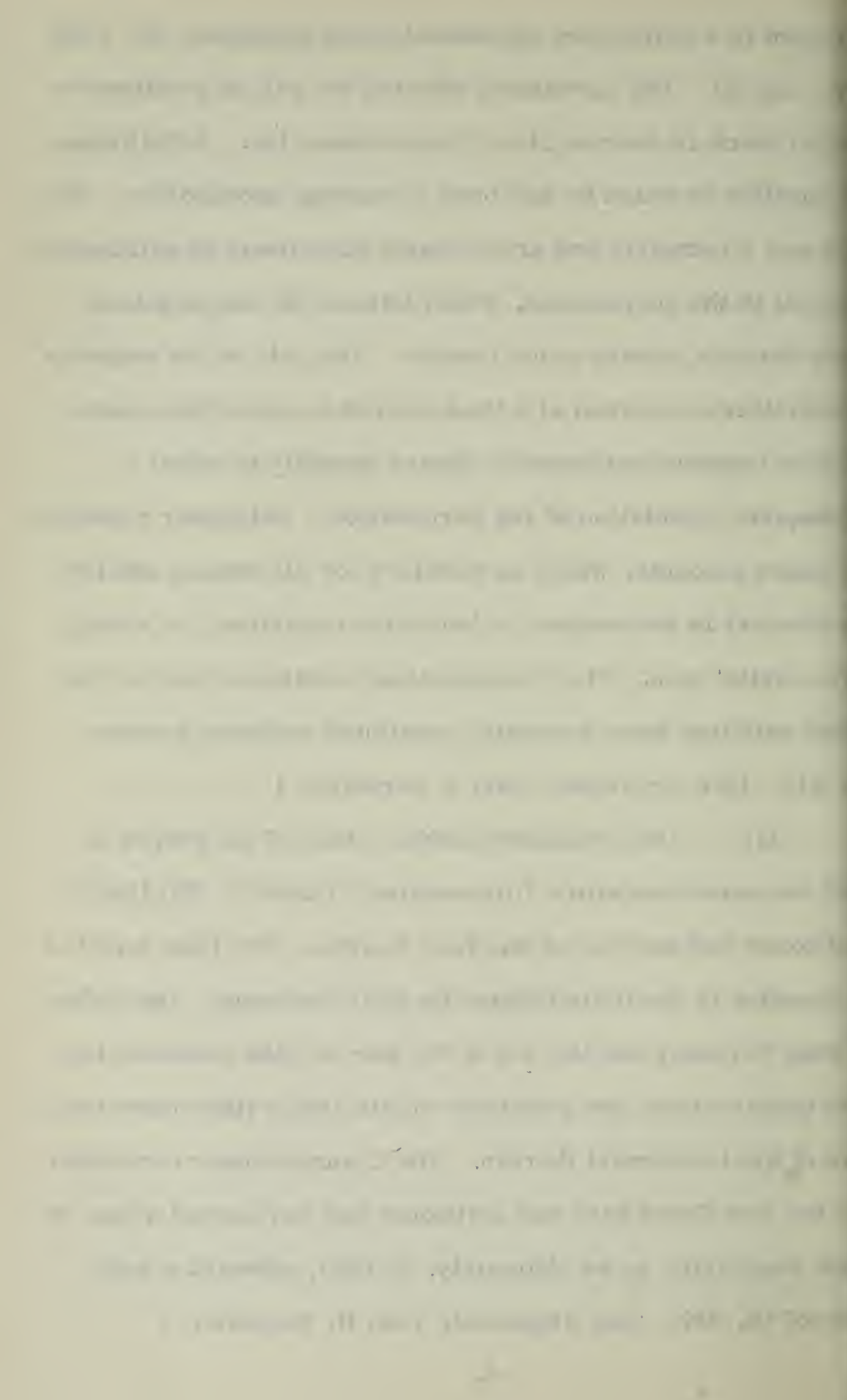
The three questions involved are these:

(1) Was \$10,824.00 received in 1945 from the film SENSATIONS OF 1945 (R. 29) ordinary income or a long term capital gain? 2/ These amounts were paid to petitioner in 1945

2/ Respondent has conceded that other amounts received from the film "Hi-Diddle-Diddle" similarly pursuant to the settlement agreement described in the text are taxable as long-term capital gain rather than ordinary income. In petitioner's view this immediately shows an inconsistency in the position of the Respondent.

ursuant to a settlement agreement dated September 23, 1943
Pet. Ex. 2). The agreement effected the sale of petitioner's
capital stock in Andrew Stone Productions, Inc., a California
corporation in which he had been a minority stockholder. The
sale was a complete and arms-length divestment of petitioner's
interest in the corporation, which interest he had acquired
more than six months prior thereto. The sale to the majority
shareholders occurred at a time when the controlling share-
holders required petitioner's shares possibly to effect a
subsequent dissolution of the corporation. Petitioner reported
the above amounts, which he received for his shares and for
his interest in the venture as hereafter described, as a long
term capital gain. The Commissioner contended and the Tax
Court held that these amounts constituted ordinary income
(R. 31). (See Argument, Part I, hereafter.)

(2) Did petitioners suffer a loss of \$5,300.00 in
1945 in connection with a film entitled STRANGE HOLIDAY?
Petitioner had purchased this film in 1943. The film depicted
an invasion of the United States by Nazi Germany. The defeat
of Nazi Germany and the end of the war in 1945 rendered the
film unmarketable and petitioner in his 1945 return reported a
loss of his investment therein. The Commissioner contended
and the Tax Court held that petitioner had not proved a loss in
1945, especially as he ultimately, in 1951, effected a sale
thereof (R. 30). (See Argument, Part II, hereafter.)



(3) Did petitioner suffer a loss of \$5,000.00 in 1945 in connection with a film entitled WHITE FURY? Petitioner had purchased this film in 1943. In 1945 petitioner was notified that his vendor had had no power or authority to transfer title to the film, that the original producer and owner had been adjudged a bankrupt in Sweden in 1939 and that the film had been sold pursuant to court order to the adverse claimant. In 1945 also the adverse claimant secured an injunction against petitioner's exhibition of the film in England, petitioner was advised that his vendor could not satisfy any judgment, and petitioner's attorney advised petitioner that he could not prevail in any litigation regarding title to the film. On his 1945 return, consequently, petitioner reported a loss of his investment in the film WHITE FURY. The Commissioner contended and the Tax Court held that petitioner had not proved a loss in 1945, especially as he had not affirmatively conceded the correctness of the adverse claim in 1945 nor aggressively pursued his claim against his vendor (R. 30). See Argument, Part III, hereafter.)

SPECIFICATION OF ERRORS

It is respectfully submitted that the Tax Court erred with respect to each of the three questions above set forth. Namely, the Tax Court erred:

(1) In holding and deciding that the amounts received by petitioner in 1945 from the film SENSATIONS OF 1945 as a result of the sale of his capital stock in Andrew Stone Productions, Inc., and in consequence of the settlement agreement with the majority shareholders thereof, dated September 23, 1943, did not constitute a long-term capital gain, as contended by petitioner, rather than ordinary income, as contended by the Commissioner.

(2) In holding and deciding that the film STRANGE HOLIDAY did not become worthless in 1945 and that petitioner was not entitled to deduct this loss in the taxable year 1945.

(3) In holding and deciding that petitioner's investment in the film WHITE FURY did not become worthless in 1945 and that petitioner was not entitled to deduct this loss in the taxable year 1945.

As will be seen in the legal argument hereafter, petitioner contends with respect to each of the above three specifications that the Tax Court erred:

(4) In that its conclusions, opinion and decision are not supported by and are contrary to the law, the evidence, its own Findings of Fact (R. 32-43) and other facts established by competent and uncontradicted proof which were not found by the Tax Court.

It follows from the above that petitioner contends that in its ultimate conclusions the Tax Court erred:

(5) In holding and deciding that taxpayer Betty Finney owes a deficiency in income tax for the year 1945 in the amount of \$3, 938. 98; and

(6) In holding and deciding that taxpayer Edward F. Finney owes a deficiency in income tax for the year 1945 in the amount of \$3, 863. 98.

ARGUMENT

I.

MONEYS RECEIVED FROM THE FILM
SENSATIONS OF 1945 CONSTITUTE A
CAPITAL GAIN RATHER THAN
ORDINARY INCOME

A. Detailed Statement Of The Facts.

For convenience, Andrew Stone Productions, Inc., is hereafter referred to simply as "Productions".

The testimony dealing with petitioner's venture, Productions and the question above is found in the following pages of the Transcript of Record: 110-116; 152-199. The Findings of Fact of the Tax Court thereon are on pages 36-42. We believe the record is uncontradicted as to the following facts:

(1) Petitioner first met Andrew Stone about 1936 or 1937 (R. 152) and in 1941 or 1942 associated with Stone to make a picture for United Artists (R. 152-153). The third

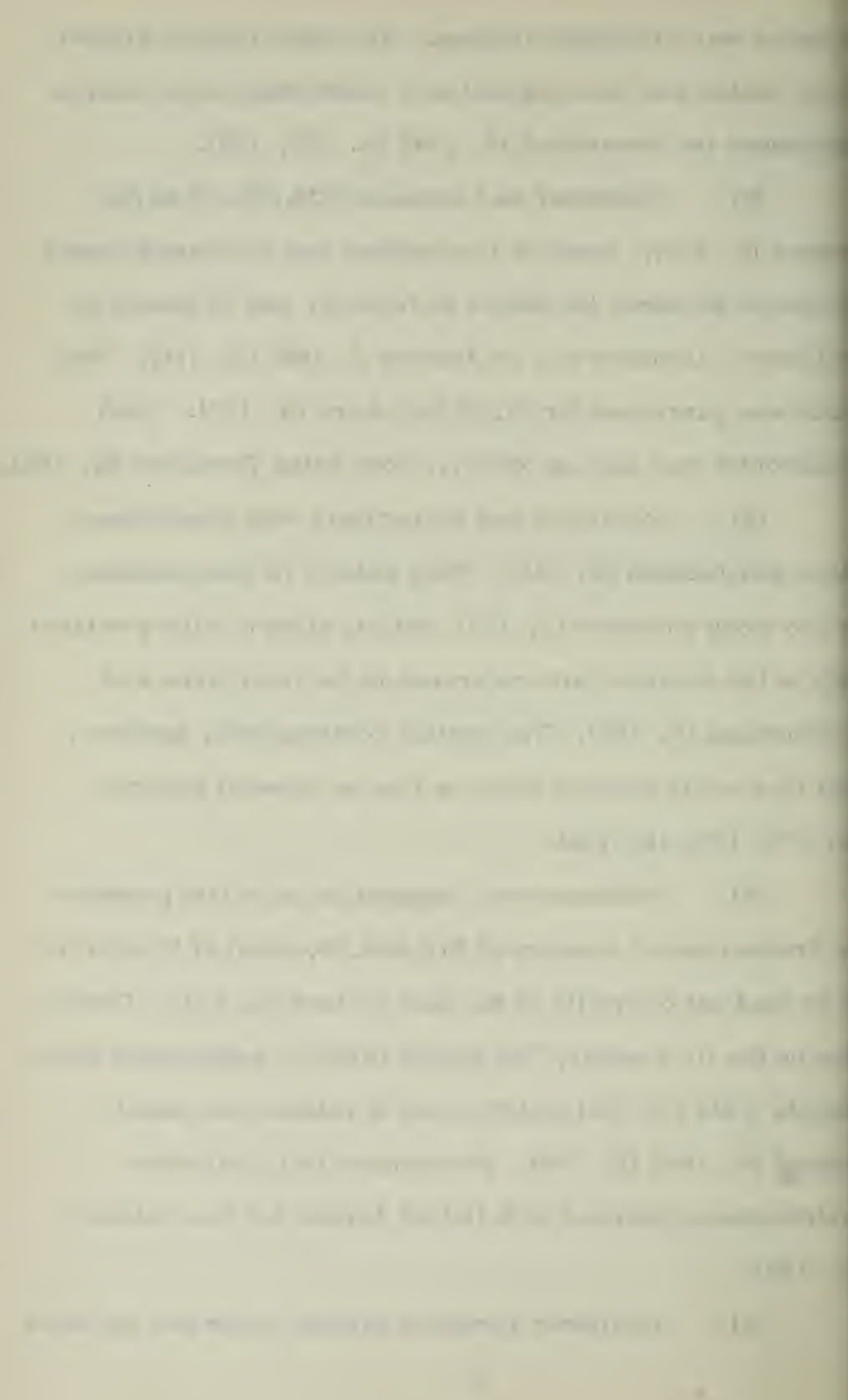
venturer was Frederick Jackson. The three formed Productions, which was incorporated as a California corporation on September (or December) 16, 1942 (R. 110, 153).

(2) Petitioner had advanced \$20,000.00 to the project (R. 110). Stock of Productions was ultimately issued 60 shares to Stone, 20 shares to Jackson, and 20 shares to petitioner; issuance was on January 8, 1943 (R. 110). The stock was purchased for \$1.00 per share (R. 110). Each stockholder was also an officer, Stone being President (R. 153).

(3) Petitioner had agreements with Productions, Stone and Jackson (R. 156). They related to compensation and to stock purchase (R. 157), but his right to salary related only to his services with reference to the first picture of Productions (R. 159). The parties contemplated, however, that they would produce three or four or several pictures (R. 173, 179, 188-189).

(4) Petitioner was engaged as associate producer by Productions at a salary of \$12,000.00, most of it deferred to be paid out of profits of the first picture (R. 111). Production on the first movie, "Hi Diddle Diddle", commenced about March, 1943 (R. 154) and the time of release was about August 20, 1943 (R. 154). Productions had a valuable distribution agreement with United Artists for this release (R. 154).

(5) Petitioner rendered various important services



in the production of "Hi Diddle Diddle", including arranging for financing (R. 194). He received \$3,000.00 at the start of production and the remainder of his \$12,000.00 salary from the proceeds of "Hi Diddle Diddle" during 1943, 1944, and 1945 (R. 111-112). This money was reported as ordinary income and is not in issue here (R. 112).

(6) Petitioner also received from the proceeds of "Hi Diddle Diddle" the return of the \$20,000.00 he had advanced plus 6% interest. This 6% interest he paid to the bank from which he had himself borrowed \$20,000.00 (R. 182). This money is not in issue here (R. 114).

(7) Within two or three months of the formation of Productions, serious personal differences arose between Stone and petitioner (R. 113).

(8) Stone and Jackson apparently desired to dissolve Productions and to assign its distribution agreement with United Artists to another corporation (R. 112, 155, 161, 192). United Artists would not have allowed petitioner to be unfairly excluded (R. 162).

(9) From May to September, 1943, petitioner, Stone and Jackson, each represented by attorneys, attempted to work out a settlement of their differences (R. 196). There were several drafts of agreements (R. 196). Ultimately an arms length settlement was worked out and embodied in the letter agreement dated September 23, 1943, which is

petitioner's Exhibit 2. For convenience, a copy of this agreement is Appendix A to this brief.

(10) At the time Exhibit 2 was executed, the distribution agreement of Productions with United Artists had not been assigned to another corporation (R. 196) and Productions had produced only one of the four pictures contemplated thereunder (R. 191, and Pet. Ex. 2).

(11) After petitioner sold his stock in Productions, it was in fact dissolved by Stone and Jackson (R. 154).

(12) The only other picture which Stone made under the United Artists agreement was SENSATIONS OF 1945. By the agreement of September 23, 1943 (Pet. Ex. 2) petitioner was to receive lump sum payments therefrom of \$5,000.00 and \$2,500.00 and 12% of the producer's net profits (see paragraphs (a) and (b) of Pet. Ex. 2; this percentage was later reduced). The moneys so received by petitioner in 1945 are in issue in this appeal. The above history and the meaning of Exhibit 2 are determinative of whether these moneys constitute ordinary income or capital gain.

B. The Transaction Shown Is An Arms Length Divestment of Petitioner's Interest In Productions and In His Joint Venture With Stone and Jackson.

We respectfully refer the Court to Petitioner's Exhibit 2, which is included herein as Appendix A. This agreement

of September 23, 1943, it will be seen, is not only an agreement by petitioner with Productions but also with Stone and Jackson individually. It sets forth not only the sale of petitioner's stock in Productions, but also the complete divorcement of petitioner from the activities of Stone and Jackson. In short, it represents not only a sale of stock but also a dissolution of a joint venture for the production and distribution of pictures -- a joint venture or partnership composed of Stone, Jackson and petitioner.

The basic error of the Tax Court was in failing to see that the consideration paid and promised to petitioner was for more than merely stock in a corporation which at that time had produced only one picture. Rather, the consideration was also for his surrender of a partnership interest in a venture which not only had produced the one picture, but also had a valuable distribution agreement (R. 154, 183, 196), the services of skilled movie principals (Stone and Jackson; R. 176), and a projected life of three or four pictures (R. 170, 183, 189). To this venture, which antedated Productions, petitioner had contributed not only money in the form of a loan and capital, but also his services and know-how (R. 194), so that its assets and good-will were in part at least attributable to him.

The very language of Exhibit 2 shows that petitioner surrendered more than his stock, and that this more was a

partnership interest: The obligees of petitioner are Productions and Stone and Jackson; petitioner's return in question was to be from "producer's net profits . . . of each of the next three motion pictures produced by Andrew Stone for release by United Artists under the existing distribution agreement . . . " (Pet. Ex. 2, Par. (b)); petitioner was completely disaffiliated from Productions, Stone and Jackson so that he "shall not be obligated to render services of any nature whatsoever in the future and shall not be deemed to be an agent, partner, representative, associate or affiliate of yourself or any of the producing companies hereafter concerned with the production of said three motion pictures . . . " (Ex. 2, Par. 4); petitioner, Stone and Jackson mutually released each other from all claims and rights (Ex. 2, Par. 6); the personal obligations of Stone and Jackson to petitioner were differentiated from the obligations of the corporation, Productions (Ex. 2, Par. 7).

That petitioner believed and contended this was what he parted with, albeit somewhat inartistically as he was in prose, is apparent throughout the record. Thus when Exhibit 2 was first introduced the following was stated:

"THE WITNESS: On the basis of that agreement, it is my contention that all of the money I received beyond the salary of \$12,000.00 was capital gain because it was for the sale of stock which permitted the dissolution of the parent company and the following

activity of the subsequent organizations that were created.

THE COURT: Was that agreement carried out as --

THE WITNESS: This agreement was carried out as it is stipulated.

THE COURT: -- as it is spelled out in this Exhibit 2?

THE WITNESS: Yes, your Honor. May I say further, your Honor, that as you probably know, the company was dissolved, but the original intention when we formed Andrew Stone Productions, Inc., was to make a series of pictures, and we came to a complete disagreement about the second or third month of our activity, " (R. 113)

Similarly, it was explained that petitioner's agreements had been with Productions and with Stone and Jackson (R. 157-158).

And at the close of the Government's cross-examination the following was stated:

"Q. I will approach the matter in another way. Why would you have possibly have objected to the liquidation and dissolution of Andrew Stone Productions, Incorporated?

A. I objected to it in the beginning because

I had a 20 per cent interest in the company and was supposed to make a number of pictures, and that is what I wanted and why I joined up with Stone, and the reason we organized the corporation. I didn't want to see the thing dissolved. It certainly wasn't to my advantage.

I feel that I actually lost money in this situation. I lost a good amount. I lost an opportunity to make a great many pictures. I think that if Stone had acted differently, we would have made three or four pictures and that was the idea in back of the whole proposition.

Q. So that what you received in Exhibit 2 was not only the value of your stock but also your value in the right to participate in the profit of future motion pictures.

A. I did receive the participation right.

Q. What you received was in lieu of or for the right you had to participate in the profits of future motion pictures. If I am not clear to you, state it and I will try to rephrase my question. Would you like me to rephrase the question?

At the time of the agreement, you not only held twenty shares of stock in a corporation known as Andrew Stone Productions, Incorporated, but you also possessed a right to share in the net proceeds of

approximately three to four motion pictures to be produced by a group of Stone, Jackson, and yourself under United Artists distribution agreement.

A. That is correct." (R. 188-189)

The Tax Court, however, felt that the controlling matter was that petitioner, by Exhibit 2, received his "full 20%" of the proceeds of the one picture which had been produced by Productions ("Hi Diddle Diddle"). To the Tax Court this meant that any additional receipts by petitioner could not be in return for the surrender of his 20% interest in the corporation and therefore had to be ordinary income. At pages 172-173 of the Record the Court stated:

"THE COURT: So that you didn't diminish the amount that you would receive on High Diddle Diddle. You got your full 20 per cent on that.

THE WITNESS: But essentially I had 20 per cent of anything that might be made. That was the idea of the corporation in its original organization.

THE COURT: I don't see how that can be if you had severed your connections with the corporation.

THE WITNESS: I didn't sever my connections. I was forced out of it, and I had no choice in the matter."

To the same effect, see the colloquy between the Court and petitioner on pages 189 - 192, including the Court's

G. M. C. 26379, 1950-1 Cum. Bull. 58
(citing additional cases)

As the bulletin of the Commissioner above cited concedes,
"It is accordingly the opinion of this office that the sale of
a partnership interest should be treated as the sale of a
capital asset under the provisions of section 117 of the Internal
Revenue Code." 3/

The rule that the sale of the partnership interest is to
be treated as a whole as a capital asset is not to be avoided
here simply because one asset of the partnership, namely,
the corporate form through which it was working at inception,
is identifiable and of determinable value. Rather, the law is
clear that where a joint venture or partnership operates
through a closed corporate form, the joint venture still
survives as between the members:

Foster v. Keating, 120 Cal. App. 2d 435,
445-447, 261 Pac. 2d 529 (1953)

Elsbach v. Mulligan, 58 Cal. App. 2d 354,
368-370, 136 Pac. 2d 651 (1943)

Hillman v. Hillman Land Co., 81 Cal. App. 2d
174, 183-185, 183 Pac. 2d 730 (1947)

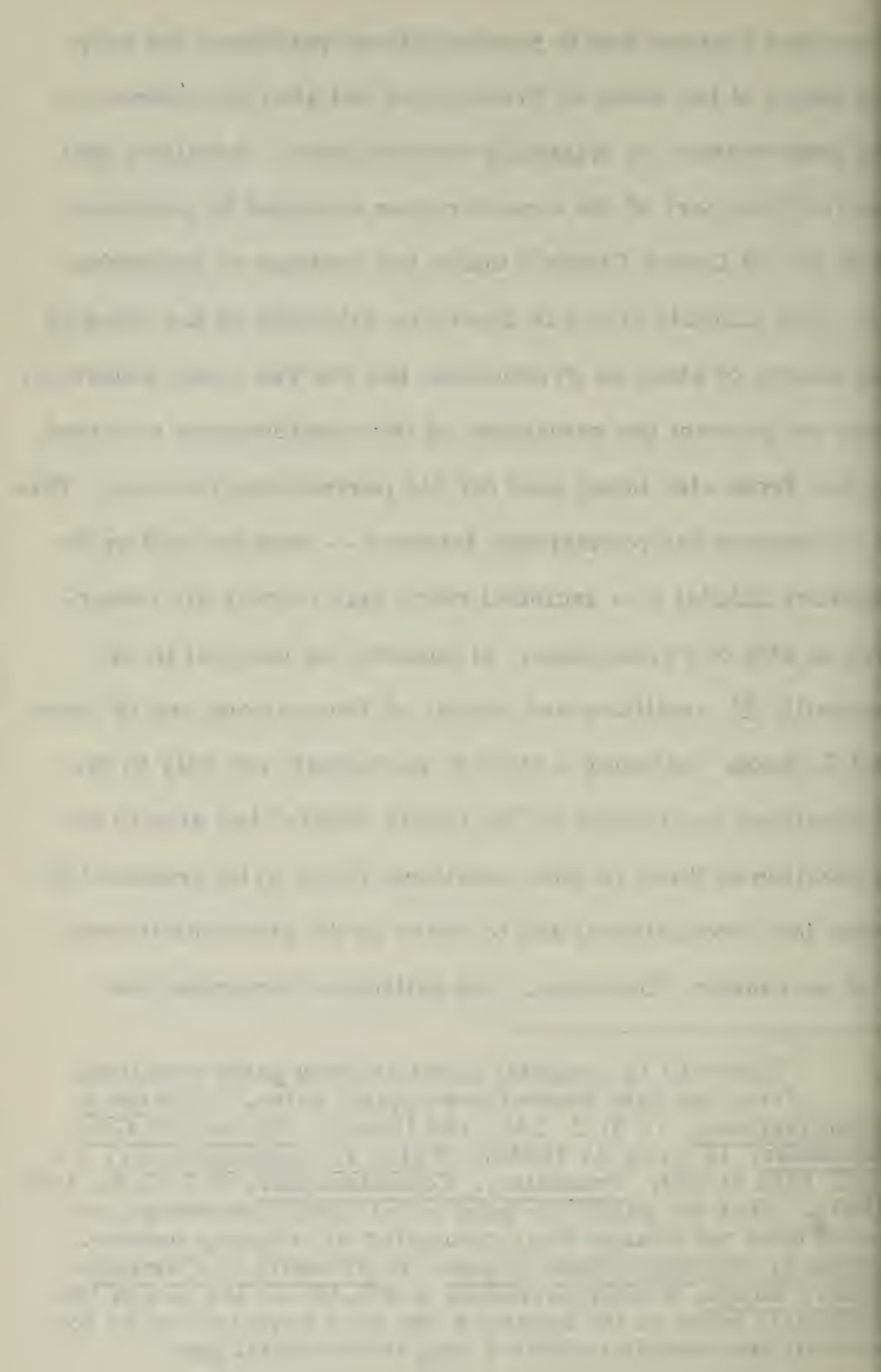
As said in the Elsbach case, supra, 58 Cal. App. 2d at 370:

"In this case the resort to the corporate mechanism cannot
efface the true purpose of the original joint venture." Here

3/ The sections referred to herein are of the 1936⁹ Internal
Revenue Code, which controls this case.

Stone and Jackson had to purchase from petitioner not only his share of the stock of Productions but also his interest in the joint venture as originally contemplated. It follows that the fact that part of the consideration received by petitioner (20% of "Hi Diddle Diddle") under the contract of September 23, 1943 (Exhibit 2) can in theory be allocable to the value of his shares of stock in Productions (as the Tax Court believed), does not prevent the remainder of the consideration received by him from also being paid for his partnership interest. This is so because his partnership interest -- what he sold by the contract Exhibit 2 -- included more than merely his ownership of 20% of Productions. It included an interest in the goodwill, ^{4/} facilities and talents of Productions and of Stone and Jackson, including a right to participate not only in the productions and profits of "Hi Diddle Diddle" but also in the production of three or four additional films to be produced by Stone (not Productions) and to share in the proceeds thereof. It is no wonder, therefore, that petitioner demanded and

^{4/} "Goodwill is a capital asset and any gains resulting from the sale thereof are capital gains." Horton v. Commissioner, 13 T. C. 143, 149 (1949). Michael v. Commissioner, 12 T. C. 17 (1949); Wyler v. Commissioner, 14 T. C. 1251 (1950); Franklin v. Commissioner, 6 T. C. M. 1099 (1947). That the gains are paid in deferred percentage payments does not change their character to ordinary income. Horton v. Commissioner, *supra*. In Franklin v. Commissioner, *supra*, weekly payments of \$75.00 for the use of the taxpayer's name in the business she sold were held to be for goodwill and taxable only as a long term capital gain.



received as consideration for the sale of his stock and of his entire claim and right against Stone and Jackson interests greater than merely 20% in "Hi Diddle Diddle", the only film then completed.

What was said in Swiren v. Commissioner, 183 Fed.2d 656, 660 (7th Cir. 1950), is applicable here, though the facts there are not ours:

"The Commissioner and the Tax Court, while correct in part in regarding as a capital asset taxpayer's unrecovered net investment and allowing recovery therefor in full amount, failed to recognize that, as a matter of law, taxpayer's partnership interest as a whole was a capital asset within Sec. 117 of the Internal Revenue Code, with the gain attending the sale thereof taxable as a capital gain, and not otherwise." (Emphasis added)

The rule that consideration paid for the transfer of a partnership interest is taxable as a capital gain is not vitiated here by the fact that the consideration in part was deferred and was to be paid out of subsequent operations of the purchasing joint-venturers.

Burnet v. Logan, 283 U.S. 404 (1931)

Commissioner v. Carter, 170 Fed.2d 911
(2nd Cir. 1948)

Westover v. Smith, 173 Fed. 2d 90
(9th Cir. 1949)

Commissioner v. Hopkinson, 126 Fed. 2d
406 (2nd Cir., 1942)

United States v. Yerger, 55 Fed. Supp. 521
(ED Pa. 1944)

George James Nicholson, 3 T. C. 596,
601-602 (1944)

Illustrative of these cases are the following:

In Commissioner v. Carter, 170 Fed. 2d 911 (2nd Cir. 1948), the sole stockholder of a corporation received on its liquidation, in addition to other assets, the rights to certain oil brokerage contracts providing for payment of commissions on future deliveries by named sellers to named buyers. These contracts, like petitioner's rights in future pictures of Stone here, then had no ascertainable fair market value. The other assets received on the liquidation exceeded the basis for the stock, and capital gain resulted on the liquidation (per §115(c) of the 1939 Code, which is not involved in petitioner's case under our analysis here). The court held with the taxpayer that as payments were received on the brokerage contracts, such payments constituted capital gain and not ordinary income, since if the contracts could have been valued when received on liquidation, such value would have produced capital gain.

In Westover v. Smith, 173 Fed. 2d 90 (9th Cir., 1949),

facts were generally similar to the Carter case, supra, and the reasoning and holding there were specifically approved by this Court. The contract involved was one where for the sale of assets the seller received "cash and the right to receive 10% of the gross sales price of machinery to be manufactured and sold by Whiting Corporation, pursuant to patents theretofore held by Quickwork Company." (173 Fed. 2d at 91) This Court stated:

"In such a situation the only practicable and accurate method of measuring the contract's value is through the application of money to such valuation as it is received."
(173 Fed. 2d at 92)

It was held that the payments should be taxed as capital gain.

In United States v. Yerger, 55 Fed. Supp. 521 (ED Pa. 1944), a business was sold for a consideration consisting of cash equal to the basis of the assets, plus a percentage of the profits of the business for the next five years. It was held that the profits so paid to the seller would be taxable only when received, and at capital gain rates. At 522 of 55 Fed. Supp. the Court stated:

"It is well settled that where capital assets are transferred to a corporation in consideration for a price which is to be paid in installments, or out of profits, or upon a

unit basis, such payments are capital in character as distinguished from income."

Additional cases, the progeny of Burnet v. Logan, 283 U. S. 404 (1931), have been well summarized in N. Y. U. Sixth Annual Institute on Federal Taxation (1947), at pages 475-476.

D. Even Assuming That Petitioner Has Shown Only the Sale of Stock in Productions and Not a Sale of a Partnership Interest in Addition, the Moneys Received from the Film SENSATIONS OF 1945 Constitute A Capital Gain Rather Than Ordinary Income.

Under this heading we accept, agendo only, what appears to be the premise of the Tax Court's reasoning, namely, that petitioner had only his 20% interest in Productions to sell as a capital asset. This premise nevertheless does not require a holding that moneys received beyond the 20% return to petitioner from "Hi-Diddle-Diddle" were ordinary income.

First we point out that the ultimate findings of the Tax Court are simply that the amounts received by petitioner from SENSATIONS OF 1945 were consideration for the sale of his stock in Productions. The findings conclude as follows:

"The amounts received by petitioner on account of 'Sensations of 1945' represent

amounts received as consideration for the sale or transfer of his shares of stock in Productions. They are not proceeds from the sale or exchange of capital assets, and are taxable as ordinary income." (R. 43)

We submit that on its face the conclusion is not supported by the finding. The law is crystal clear that unless one is a dealer selling to customers, gains and losses from the sale of shares of stock are capital.

Commissioner v. C. A. Sporl & Co.
118 Fed. 2d 283 (5th Cir. 1941)

Commissioner v. Burnett, 118 Fed. 2d
659 (5th Cir. 1941)
and numerous cases there cited.

Thus, the consideration received for the sale of petitioner's capital asset -- shares of stock in Productions -- cannot be ordinary income. (The fact that the consideration was deferred does not, as shown by the cases cited above on page 20, change the nature thereof: it still remains a capital gain.)

Taking the Tax Court's ultimate findings on their face, therefore, there must be a reversal without more.

Out of an excess of caution, however, we discuss the Tax Court's conclusion on the premise that it rested on the Tax Court's belief that petitioner's shares of stock

could not be given a value greater than a twenty percent interest in HI-DIDDLE-DIDDLE, the only film in existence at the time of his sale. We do so because it is apparent that the Trial Court believed that when majority shareholders buy out a minority shareholder, as here, the latter is restricted in the consideration paid him for his stock to an amount equal only to his pro-rata interest in a particular tangible asset which the corporation may then have. That is, the Tax Court reasoned that since Productions had produced only HI-DIDDLE-DIDDLE at the time of the sale of petitioner's stock, Stone and Jackson could or would pay him for his capital asset (stock) only an amount from HI-DIDDLE-DIDDLE proportionate with his interest in the corporation. As the Tax Court put it: "So that you didn't diminish the amount that you would receive on High Diddle Diddle. You got your full 20 per cent on that." (R. 172) This too was the Government's approach:

"... Andrew Stone alone could have liquidated it [Productions] and dissolved the corporation. If he had done so, the only asset distributed was High Diddle Diddle or the net proceeds from reproduction or exhibition of High Diddle Diddle, which means that you could have received no more than 20 per cent of the net proceeds of High Diddle Diddle.

* * *

"... Your stock would only be worth 20 per cent of the net proceeds of High Diddle Diddle ..." (R. 178-179)

This approach, however, overlooks what legally must be controlling here:

(a) The sale of petitioner's stock to adversary shareholders in an arm's length transaction cannot be equated with a dissolution of the corporation and a distribution of its assets pro rata to him. Rather, it must remain simply a sale of stock: Stone and Jackson purchased petitioner's stock to obtain for themselves complete control of Productions so that they could do with Productions what they wished. It is true that it appears that shortly thereafter Productions was dissolved by Stone and Jackson (R. 154, 196), but this subsequent event to which petitioner was not a party cannot retroactively determine that the value of petitioner's stock, to Stone and Jackson or to anyone else, was only his pro rata interest in the single film Productions then had.

(b) In fact, of course, Productions had assets in addition to HI-DIDDLE-DIDDLE. At the time of petitioner's sale of his stock, Productions was a going corporation with contemplated future production. It had a valuable asset in a distribution contract with United Artists (R. 154, 183, 196). It had valuable talent, Stone and Jackson, available to it (R. 153, 193). It had established lines of credit (R. 156, 194).

In short, realistically and legally there is absolutely no basis for holding that the value of petitioner's shares of stock therein must be determined solely by reference to the one film it had then completed.

(c) It is no answer to (a) and (b) above to contend, as the Government did in the Tax Court, that Stone and Jackson could have dissolved Productions regardless of petitioner's interest therein and could thus have forced him to receive in dissolution only his proportionate share from HI-DIDDLE-DIDDLE. (See R. 178-179). This is no answer because, in fact, petitioner as a minority shareholder could have prevented dissolution of Productions by Stone and Jackson except through a protracted court proceeding. 5/

The pertinent California statutory provisions in 1943 were the then sections 399 through 404c of the Civil Code, which are respectfully called to the Court's attention. It is true that they provided for the commencement of voluntary dissolution by the vote or consent of 50% or more of the voting power (§400). But dissolution could not be effected and distribution to shareholders could not be made until "all

5/ Beyond that, since at the time of Exhibit 2 petitioner was also a creditor of Productions, he could have wholly prevented dissolution of Productions until he was fully paid his salary on "Hi-Diddle-Diddle" and repaid the moneys he had loaned to Productions. See Cal. Civil Code §401a as it existed in 1943.

the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for . . . "

(§401a) 6/ Liability for improper distributions was imposed on the shareholders. (§402). More important, and directly pertinent to the power which petitioner had as a minority shareholder, was §403:

"If a corporation is in the process of voluntary winding up, the superior court in and for the county where the principal office of the corporation is located, upon petition of the corporation or the holders of five percent or more of the number of its outstanding shares or of three or more creditors, upon such notice to the corporation and to other persons interested in the corporation as shareholders or creditors as the court may order, shall have power to order and adjudge as to any or all matters in and for the winding up of the affairs of the corporation including:

6/ The section in part further provided: "The payment of a debt or liability shall be deemed to have been adequately provided for if the payment thereof has been assumed or guaranteed in good faith by one or more financially responsible corporations or other persons, and such provision was determined in good faith and with reasonable care by the board of directors to be adequate at the time of any distribution of the assets by the directors hereunder."

- (1) The presentation and proof of all claims and demands against the corporation . . .
- (2) The settlement or determination of all claims of every nature against such corporation or any of its property, . . .
- (3) The determination of the rights of shareholders and of all classes of shareholders in and to the assets of the corporation.
- (4) The presentation and the filing of intermediate and final accounts of the directors and hearings thereon, and the allowance, disallowance or a settlement thereof, and the discharge of the directors from their duties and liabilities.
- (5) The appointment of a referee to hear and determine any or all matters with such power or authority as the court or judge may deem proper.
- (6) The filling of any vacancies in the number of directors which the directors or shareholders are unable to fill.
- (7) The removal of any director if it is made to appear that he has been guilty of dishonesty, misconduct, or abuse of trust in conducting the winding up, or if he be unable to act . . .
- (8) The notices to be given of any hearing or order . . .

- (9) Staying the prosecution of any suit . . .
- (10) Determining whether adequate provision has been made for payment or satisfaction of all debts and liabilities not actually paid.
- (11) The revocation of the election to wind up and dissolve by the shareholders, and the making of orders for the withdrawal and termination of proceedings to wind up and dissolve, subject to conditions for the protection of shareholders and creditors.
- (12) The making of an order, upon the allowance or settlement of the final accounts of the directors, that the corporation has been duly wound up and is dissolved. Upon the making of such order, the corporate existence shall cease except for purposes of further winding up if needed.
- (13) Any and all other matters concerning the winding up of the affairs of the corporation. "
- (Emphasis added)

The comparative simplicity of a voluntary dissolution without court proceedings can be seen by contrasting the above with the provisions of the then §403c(1) of the California Civil Code, which in effect gave the majority of the Board of Directors a free hand in the dissolution process and required

only the filing of a certificate of dissolution. 7/

7/ §403c(1) then read:

"When a corporation has been completely wound up without court proceedings therefor, a majority of the directors or trustees shall sign and acknowledge a certificate stating:

(a) That the corporation has been completely wound up.

(b) Whether its known debts and liabilities have been actually paid, or adequately provided for, or paid as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be.

(c) Whether its known assets have been distributed, or wholly applied on account of its debts and liabilities, or that it acquired no known assets, as the case may be.

Such certificate shall be filed in the office of the Secretary of State and thereupon corporate existence shall cease except for the purpose of further winding up if needed. A copy of the certificate certified by the Secretary of State shall be filed in the office of the county clerk of the county in which the principal office of the corporation is located.

Before any corporation taxed under the Bank and Corporation Franchise Tax Act may file a certificate of dissolution it must file or cause to be filed with the Secretary of State the certificate of the Franchise Tax Commissioner provided for by Section 29 of said act. "

(As amended at the 1943 Legislative session and in effect August 4, 1943. Prior to such amendment the section was even simpler and less onerous than above in the requirements of its certificate.)

If, therefore, the parties hereto may speculate as to whether dissolution of Productions was the purpose of Stone and Jackson in purchasing petitioner's shares, it follows that such purpose would increase rather than restrict the value of petitioner's shares to them; for only if they bought petitioner out would they have a free hand in the dissolution of Productions. If they did not buy him out, he could prevent or greatly delay dissolution and could require its strictest supervision by the California court. The value of his shares to them, therefore, greatly exceeded his proportionate interest in HI-DIDDLE-DIDDLE.

(d) The above analysis of the value of petitioner's shares in Productions cannot be avoided by the assertion that petitioner's interest in the additional films was given to him for the release of his rights under an employment contract. In the first place, the Tax Court's ultimate finding was simply that the moneys from SENSATIONS OF 1945 represented consideration for petitioner's stock, and not consideration for the release of a salary right. In the second place, petitioner testified he had no contract right to employment on future films:

"Q. Will you explain to the Court what was your provision for salary-compensation as to future motion pictures produced by either Productions Corporation or by any other

corporation, in which Mr. Stone or Mr. Jackson were stockholders or controlling stockholders.

A. At that time, no arrangement had been made for future salaries. I presume that would have been arranged once the picture had gotten underway, the subsequent picture, but as I explained to you, in the middle of High Diddle Diddle, we had this disagreement, so we never got into salaries or future pictures.

THE COURT: Did the \$12,000 salary relate to that one picture?

THE WITNESS: Related to the one picture, yes, your Honor." (R. 158-159)

As petitioner put it, "The only right I had was the right of a stockholder." (R. 159-160)

If the ultimate finding of the Tax Court be accepted -- that the amounts received from SENSATIONS OF 1945 were consideration for the sale of petitioner's stock in Productions -- the judgment must be reversed without more.

If the Court can consider the apparent premise of the Tax Court that the value of petitioner's stock could only be equal to 20% of the return from HI-DIDDLE-DIDDLE, the judgment must nevertheless be reversed for the reasons stated in D above.

If the Court believes that the record truly shows that more than petitioner's stock was sold or transferred, the judgment must nevertheless be reversed for the reasons stated in B and C above.

We conclude that in any event the judgment of the Tax Court that the amounts received from SENSATIONS OF 1945 constituted ordinary income was erroneous.

THE MOTION PICTURE "STRANGE
HOLIDAY" BECAME WORTHLESS IN
1945 AND PETITIONER WAS
ENTITLED TO DEDUCT THIS LOSS
IN 1945

A. Detailed Statement of the Facts.

The testimony dealing with the motion picture

STRANGE HOLIDAY is found in the following pages of the Transcript of Record: 83-99; 118-132. The Findings of Fact of the Tax Court thereon are on pages 33-34. We believe the record is uncontradicted as to the following facts:

(1) The film STRANGE HOLIDAY was made by

General Motors during the middle of the war. General Motors sold it to M. G. M., and in 1943 petitioner purchased the film from M. G. M. for \$4,000.00 (R. 84-85). The film dealt with a Nazi invasion of the United States (R. 83-84).

"The picture is very much preachment, and long scenes, perhaps a reel and a half or more at a time, are given to Rains in a cell where he had been thrown by the Nazi faction and subjected to all sorts of cruelties." (R. 93-94).

(2) "So that the film would be qualified for general

presentation in the theaters," (R. 84) petitioner thereafter expended \$6,300.00 for actors, laboratory work, reediting and kindred production expenses. (R. 85) The bulk of these

expenditures were in 1944. Expenditures in 1945 were of small amounts and no work was done on the film or expenses incurred thereon after the summer of 1945. (See R. 122) 8/

(3) The surrender of Nazi Germany occurred in May, 1945; the end of the war occurred in August, 1945. (R. 152) " ... no comparable picture ... has been made since then." (R. 132)

(4) Petitioner's desperate efforts (R. 94) to obtain distribution and booking of STRANGE HOLIDAY in 1945 were uniformly unsuccessful, despite the fact that he dealt with several distributors including those who specialized in such features. (R. 90-94) His lack of success, of course, is relevant to show the worthlessness of the film in 1945.

(5) Petitioner was informed in 1945 by all the distributors and experts he contacted that in their opinion the film STRANGE HOLIDAY was then worthless. Assuming that such opinion is hearsay and not admissible to prove the ultimate fact of worthlessness (see the Government's objection R. 91), nevertheless petitioner's testimony concerning such other opinion was admissible to prove petitioner's state of mind concerning the value of the film in 1945. Such state of mind is relevant and of considerable importance in determining whether he is entitled to a loss in 1945. As stated in

8/ The Court's opinion states, "In fact, work continued and sums were expended on that picture until August of 1945." (R. 43)

Boehm v. Commissioner, 326 U.S. 287, 293, "The taxpayer's attitude and conduct are not to be ignored . . ."

(6) At the end of 1945 petitioner "wrote the thing off completely" (R. 129) and a physical entry to that effect was then made in his books of account. (R. 129)

(7) After 1945 the film was simply stored at a laboratory and petitioner paid no storage charge whatsoever. (R. 128).

(8) Until the end of 1945 petitioner carried insurance on the film; after 1945 he carried no insurance thereon (R. 129)

(9) No loan was ever sought against the film, and its salvage value was a mere \$10.00 (R. 130)

(10) After 1945 petitioner made no concerted efforts to sell any rights in the film. As he put it, "We practically abandoned the picture in '45" (R. 122). The subsequent realization of \$2,100.00 therefrom in 1951 was the result of a casual conversation and not the result of a continuous or any effort to sell the film. (See R. 123-125) 9/

(11) For over five years after the film became

9/ We are aware that the Tax Court findings contain the sentence "Thereafter, he kept the picture in storage but without payment of storage fees, and made constant but non-intensive efforts to sell or distribute it." (R. 33. See also opinion p. 44.) We believe that upon analysis of the record the latter part of this finding cannot stand. See argument *infra*.

worthless petitioner did not realize a penny from it. (R. 94-95) When ultimately petitioner did realize \$2,100.00 therefrom in 1951 (which he reported as ordinary income, R. 95), it was only because a third person invested over \$20,000.00 in the film for extensive changes in an effort to change its Nazi theme. (R. 95-97). Petitioner himself expended nothing on the film in 1951 when he ultimately disposed of it. (R. 132).

B. The Record Clearly Shows the Loss
 To Have Occurred in 1945.

Petitioner is aware that the Tax Court found that "'Strange Holiday' did not become worthless in 1945." (R. 42). Petitioner is also aware that "Whether and when a deductible loss results ... is a factual question ... to be decided according to the surrounding circumstances." Alison v. United States, 344 U.S. 167, 170 (1952). Petitioner nevertheless respectfully urges that this record cannot sustain the "finding" of the Tax Court, and that a loss under Section 23(E) of the 1939 Code is clearly shown.

Every one of the eleven items listed above under the Detailed Statement of the Facts points irresistibly towards the worthlessness and abandonment of STRANGE HOLIDAY in 1945. Items (1), (2), (3), (4) and (5) above establish the nature of the film and the destruction of its value both objectively and subjectively by the end of the war and by the

public's changed mood. See R. 84. Items (6), (7), (8), (9) and (10) above clearly establish that petitioner closed the transaction on his books and abandoned the film as a matter of fact in 1945.

Item (11) -- no return for five years and then a chance realization of a small part of petitioner's investment -- emphasizes the worthlessness in 1945. In 1945 petitioner was not entitled to speculate that in the distant future some unknown use for the footage might turn up. On the contrary, in 1945 after the termination of the war and in the face of a completely negative response from distributors and experts in the field, petitioner was not required to be "an incorrigible optimist."

United States v. S. S. White Dental Co.,
274 U.S. 398, 403

Niagara Share Corp. v. Commissioner,
82 Fed.2d 208, 211-212 (4th Cir., 1936)

Commissioner v. John Thatcher & Son,
76 Fed.2d 900, 902 (2nd Cir., 1935)

Commissioner v. Highway Trailer Co.,
72 Fed.2d 913, 914-915 (7th Cir.,
1934)

Cahn v. Commissioner, 92 Fed.2d 674, 676
(9th Cir. 1937)

Against the above array of uncontradicted evidence, the Tax Court found that a loss did not occur in 1945 (1) because petitioner expended some moneys on STRANGE HOLIDAY in 1945 after the end of the war with Germany

(R. 33, 43) and (2) because he made "constant but non-intensive efforts to sell or distribute it" (R. 33, 44) and did sell it in 1951 (R. 30).

The first reason of the Tax Court, however, is clearly specious and improper on its face: unless petitioner attempted to sell or distribute his film after the end of the war with Germany he could not claim or show that that event had rendered it valueless. The end of the war and the concomitant change in public attitude did not stamp an imprimatur of worthlessness on the film without more. It was only after further expenditures in 1945 to August or thereabouts and after intensive efforts to sell or distribute the film after the end of the war in 1945 that petitioner and the industry became convinced that the film had been rendered valueless. To give petitioner's expenditures in 1945 any other legal effect is to preclude a taxpayer from taking any steps to realize upon an asset which the events of history may have withered. "The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal, test." Lucas v. American Code Co., 280 U. S. 445, 449. Just as the taxpayer is not required to be an incorrigible optimist, he is not permitted to be an incorrigible pessimist. See:

Lucas v. American Code Co., 280 U. S.
445, 450-452 (1930)

The second ground for the Tax Court's holding is, we submit, unsupported on this record. It is true that petitioner on pages 95 and 98 of the Record testified he had been making efforts "constantly" to dispose of the picture during 1945-1951. But his use of that word and the word "concerted" was explained at length in detailed testimony. The Court is respectfully referred to pages 122-125 of the Record where petitioner testified categorically that no attempts were made to sell the film in 1946 or 1947, "that we practically abandoned the picture in '45", that "I would say that no effort was made at all," and " ... when I wrote it off in 1945, I just took it as a dead loss and figured that was the end of it, and if it hadn't been for that friend of mine, who, in spite of -- I mentioned it to him casually one time that I had this film, and he said, 'Well, I'd like to see it.'"

Indeed, this Court has held that subsequent recovery does not prevent proof of loss in a prior year.

Cahn v. Commissioner, 92 Fed. 2d 674
(9th Cir. 1937)

Rhodes v. Commissioner, 100 Fed. 2d 966
(6th Cir. 1939)

We submit that the detailed testimony cannot support a finding that petitioner did not abandon his efforts to sell the film at the end of 1945, and we submit that petitioner is

entitled to a loss for that year. In the language of the applicable regulation, the loss was "evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period ..."

J. S. Treasury Reg. 111, §29.23 (e) -1(b).

III

THE MOTION PICTURE 'WHITE FURY'
BECAME WORTHLESS IN 1945 AND
PETITIONER WAS ENTITLED TO DEDUCT
THIS LOSS IN 1945.

A. Detailed Statement of the Facts.

The testimony dealing with the motion picture WHITE FURY is found in the following pages of the Transcript of Record: 99-108; 132-143; 150-151. The Findings of Fact of the Tax Court thereon are on pages 34-36. We believe the record is uncontradicted as to the following facts:

(1) Petitioner purchased the film in 1943. Total purchase price was \$3,000.00, \$500.00 of which he paid in 1943 and \$2,500.00 of which he paid in 1945. (R. 99, 132) The bill of sale which he received was signed by one Thor Brooks who signed for and purported to have power of attorney for the corporate owner and for the president of the corporation; Brooks also signed the bill of sale in his own behalf (R. 99, 137). The film had been made in Lapland under

Swedish auspices and Brooks had been both director and producer. (R. 100) Petitioner believed Brooks had authority to sell the film. (R. 101).

(2) During 1944 and 1945 petitioner expended \$7,000.00 more on the film to make it acceptable for English speaking audiences. (R. 100, 104) (The total amount of \$10,000.00 is not contested. R. 105). The picture was ready for showing in 1945 (R. 100), and he was attempting to sell the rights in England.

(3) In 1945 representatives of the Swedish company Scandia Films informed petitioner and his proposed English vendee that the corporation which had produced and owned the film had gone bankrupt in 1939. (R. 102, 133; Resp. Ex. E). In addition, in 1945 Brooks himself "had to finally admit that apparently he had no right to make the sale." (R. 106, 139)

(4) Petitioner urged his prospective English vendee to oppose the legal proceedings instituted by the Swedish claimants in England in 1945 (R. 150-151). He testified:

"Q. How long did you continue to urge this opposition?

A. When the Swedish people got out an injunction and clamped down on the negative, which was in a laboratory in England, that was the end of all operations as far as the picture was concerned.

Q. This seizure did not occur until 1946.

A. The actual possession of the film perhaps was in '46 but the closing down on it, I believe, was in '45." (R. 151)

(5) During 1945 and with respect to the claims of the Swedish adversaries petitioner consulted his attorney "right along". (R. 134) His attorney advised him that he could not prevail in any litigation over the title to the film, that he was faced with long and expensive litigation, and that the best thing to do was to abandon the project. (R. 100-101, 134, 140-141). His attorney informed him that he had no rights. (R. 141).

(6) Petitioner determined in 1945 that his seller was financially unable to respond to any claim petitioner might make against him (R. 102, 138-140). Further, as the Government attorney put it, Brooks "virtually admitted that he perpetrated a fraud." (R. 139, and see R. 102).

(7) In December of 1945, petitioner's accountant made his book entry writing off the film as a loss. (R. 143) Petitioner's last expenditure on the film was in 1945 (R. 133), and in 1945 he abandoned all efforts with respect to that film. (R. 106-107, 108).

B. The Record Clearly Shows the Loss
 To Have Occurred in 1945.

Petitioner urges that this record cannot sustain the "finding" of the Tax Court that a loss did not occur in 1945 under §23(e). (R. 42). As shown by its opinion, the Tax Court believed that the evidence did not show a completed loss in 1945 because petitioner then did not affirmatively concede the correctness of his adversary's position and because actual seizure of the negative in England may not have occurred until 1946. (R. 44-45)

However, the law does not require that affirmative concession be brought home directly to the adversary. Here petitioner was advised by his own attorney to abandon the project and in the taxable year made his book entry and actually abandoned the film. He was not required either by the tax law or by common sense to shore up his record by an express writing to the Swedish claimants that he was abandoning the field to them.

As to the date of seizure, there are two obvious answers. First, whether petitioner suffered a loss in 1945 is not concluded by the fact, if so it be, that actual seizure did not take place until 1946 if in fact, as so it was, the adverse claim had been fully established in 1945 to the satisfaction of petitioner, his attorney and his proposed vendee and an

injunction had already been issued in 1945 in favor of the claimant.

Second, the record shows (despite the language of the Tax Court's opinion) that the seizure had taken place in 1945. See R. 106-107: "... the negative ... had been seized by the Swedish people, also, ..."

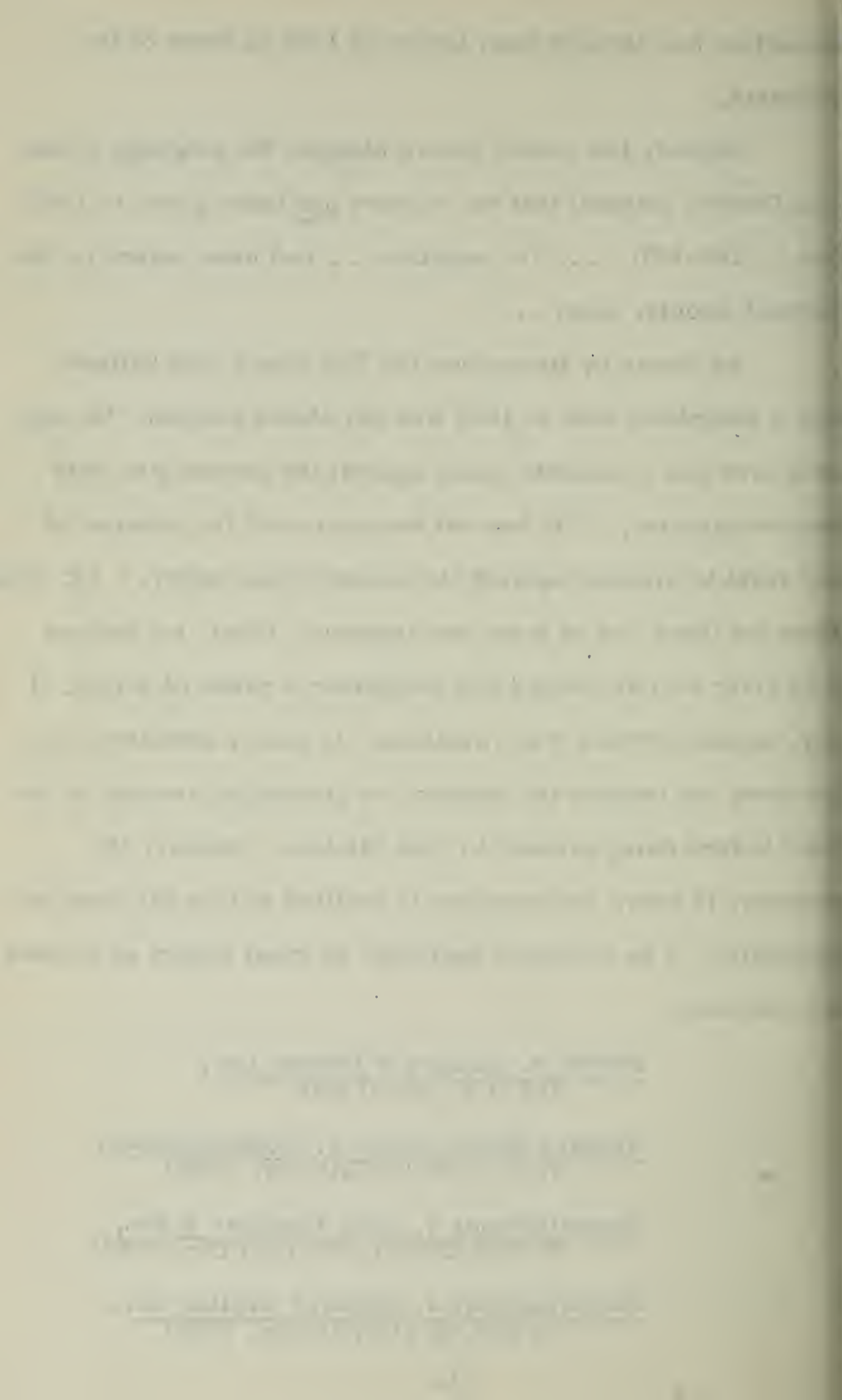
As shown by its opinion the Tax Court also believed that a completed loss in 1945 was not shown because "He may well have had a valuable claim against the person who sold him the picture ... He has not demonstrated the absense of any right to proceed against the unauthorized seller." (R. 45). Here too there are at least two answers: First, we believe it is clear on this record that petitioner's cause of action, if any, against Brooks was valueless. In such a situation, the law does not require the taxpayer to pursue his remedy to the limit before being allowed to take his loss. Rather, the converse is true: the taxpayer is entitled to take his loss and thereafter, if he recovers anything, he must report as income any recovery.

Burnet v. Sanford & Brooks Co.,
282 U. S. 359 (1931)

Niagara Shares Corp. v. Commissioner,
82 Fed. 2d 208 (4th Cir. 1936)

Commissioner v. John Thatcher & Son,
76 Fed. 2d 900, 902 (2nd Cir. 1935)

Commissioner v. Highway Trailer Co.,
72 Fed. 2d 913 (7th Cir. 1934)



Please see full discussion in the Niagara Shares case, supra, esp. page 211 of 82 Fed. 2d:

"To postpone the settlement of the question of the amount of the taxes that should be paid until the end of the litigation over the guaranty contract would result in unnecessary delay and render uncertain the amount of the taxpayer's liability." 10/

Second, it is clear that Brooks perpetrated a fraud, and consequently petitioner must deduct his loss either when discovered or during the year of expenditure -- in this case 1945 with the exception of \$500.00 paid in 1943.

Alison v. United States, 344 U. S. 167
(1952)

Borden v. Commissioner, 101 Fed. 2d 44
(2nd Cir. 1939)

It follows from all the above that petitioner was entitled to treat his investment in WHITE FURY as a loss in 1945. His action was properly governed by the rule of United States

10/ The only case cited by the Tax Court on this point, H. D. Lee Mercantile Co. v. Commissioner, 79 Fed. 2d 391 (10th Cir. 1935), is clearly inapplicable. In that case, "... the seller was a large responsible concern, amply able to respond for breaches of contract." (p. 392) "Nor does the record disclose any identifiable event by which to associate the loss with the 1927 tax year." (p. 393) "If there was a loss, the record is silent as to the amount of it" (p. 393)

v. S. S. White Dental Co., 274 U. S. 398, 403, and the other cases cited supra at page 38. Petitioner was not required to be "an incorrigible optimist" but could make a realistic appraisal of the situation, especially upon advice of his attorney.

Cahn v. Commissioner, 92 Fed. 2d 674, 676
(9th Cir. 1937)

Haywood Lumber & Mining Co. v. Commissioner,
178 Fed. 2d 769, 771 (2nd Cir. 1950)

CONCLUSION

For each and every of the reasons above stated, petitioners pray that the judgment of the Tax Court herein be reversed and that it be adjudged that there is no deficiency in income tax for the year 1945 with respect to Betty Finney or Edward F. Finney.

Respectfully submitted,

PAUL P. SELVIN and

IRVING ROGOSIN,

Attorneys for Petitioners.

The first thing I noticed when I stepped out of the car was the smell of the sea. It was a salty, fresh scent that seemed to fill the air. I took a deep breath and felt a sense of peace wash over me. The sun was shining brightly, and the waves were crashing against the shore. I walked along the beach, feeling the sand under my feet. The water was so clear, and the colors were so vibrant. I had never seen anything like this before. It was like a dream come true. I had heard that the beach was beautiful, but I didn't realize how amazing it would be. I was so lucky to be here. I had to take a picture of the beach. I wanted to remember this moment forever. I had never been so happy before. I had found a place that was perfect for me. I was so lucky to be here. I had to take a picture of the beach. I wanted to remember this moment forever. I had never been so happy before. I had found a place that was perfect for me.

Conclusion

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APPENDIX A

Copy of Petitioner's Exhibit 2

Los Angeles, California
September 23, 1943

The Tax Court of the
U. S.

April 10, 1956

C
O
P
Y
Andrew Stone Productions, Inc.
Andrew L. Stone and
Frederick Jackson
Los Angeles, California.

Gentlemen:

This will confirm our understanding that all previous agreements heretofore entered into between us including but not limited to those agreements dated as of December 31, 1942, March 10, 1943, and August 6, 1943, are rescinded and cancelled and in addition to the salary of \$12,000 for my services rendered in connection with the production of the motion picture photoplay Hi-Diddle-Diddle of which sum I have heretofore received \$3,000 and the remainder of \$9,000 is to be paid to me concurrently with salary payments yet to be made to Andrew L. Stone and Frederick Jackson as negative costs of Hi-Diddle-Diddle, are recouped, I hereby agree to sell to you or your nominees all capital stock now held by me in Andrew Stone Productions, Inc., for the following consideration, to-wit:

(a) In addition to the sum of \$9,000 cash to be paid me from recoupment of the negative cost of Hi-Diddle-Diddle constituting deferred salary and hereinabove referred to) I am to receive \$5,000 in cash within three weeks of the commencement of the principal photography upon the next picture to be produced by Andrew Stone together with the deferred payment of \$2,500.00 payable within two years from the release date of said picture and in addition thereto I am to receive a cash payment of \$5,000 within three weeks from the commencement of principal photography upon the second motion picture yet to be produced by Andrew Stone, and an additional cash payment of \$6,000 within three weeks from the commencement of principal photography upon the third picture yet to be produced by Andrew Stone for release by United Artists under the existing distribution agreement or any extension, renewal, replacement of substitution thereof.

(b) In addition to the cash payments hereinabove specified I am to receive directly from United Artists as distributor of Hi-Diddle-Diddle, 20% of the producer's net profits receivable by producer from the production and/or distribution of Hi-Diddle-Diddle and 12% of the producer's net profits receivable by producer from the production and/or distribution of each of the next three motion pictures produced by Andrew Stone for release by United Artists under the existing distribution agreement or any extension, renewal, replacement or substitution thereof. "Producer's net profits" is hereby defined as any and all sums directly or indirectly accruing or payable to the producer from the production and/or distribution of each of said motion pictures after deducting the following costs and expenses if legitimately and in good faith paid by the producer in connection with each of said motion pictures accounted for separately:

i. The cost of production of each of such motion pictures (subject, however, to the limitations hereinafter contained in paragraph numbered 1).

ii. All financing costs as such term is hereinafter defined in paragraph numbered 8 hereof.

iii. All administrative expenses connected with the business of producing, distributing and exhibiting the said motion picture, including legal and accounting expenses.

iv. All sums (not already deducted by the distributor) directly expended or incurred by the producer for prints, replacements, advertising, publicity, quota charges, imports, direct taxes on the motion pictures, film, and/or prints, and on the gross receipts.

v. The cost of supervising the distribution of the motion pictures and all overhead incurred in connection therewith.

vi. The costs and expenses of any litigation in connection with or relative to the production, distribution or exhibition of such motion pictures.

vii. All taxes including income and excess profits tax levied by the United States Government or any state or political subdivision thereof or foreign countries, excepting income taxes levied upon individuals based upon their distributive share of net income or individual capital gain.

1. In connection with the respective negative cost of the said three additional motion pictures yet to be produced by Andrew Stone and referred to in paragraph lettered (b) on the first page hereof, the amounts budgeted or paid for services of producer, director, writers, for story, and for screen play, shall individually approximate corresponding items budgeted for Hi-Diddle-Diddle but in no event (insofar as I am concerned) shall the aggregate exceed \$80,000.00 for any of said pictures, and the excess above \$80,000.00 shall not be charged as negative costs for the purpose of fixing and determining the net proceeds of 2% to be paid to me; provided, however, that the foregoing shall not apply insofar as you may legitimately and in good faith pay any amount or amounts in excess of \$10,000.00 to any writers other than yourselves or for the purchase of any story or screen play written or procured from any one other than yourselves.

2. I consent to the pledge of my share of the residual values in Hi-Diddle-Diddle upon the same basis only as the pledge of all other residual shares as security for financing necessary to production of the second picture to be produced by Andrew Stone and I furthermore consent to the pledge of my share of the residual values upon the second picture yet to be produced by Andrew Stone for financing necessary to production of the third picture to be produced by Andrew Stone, upon the same basis as the pledge of all other residual shares, and I furthermore consent to the pledge of my share of the residual values in the third picture to be produced by Andrew Stone upon the same basis as all other residual shares, if it is necessary to pledge the same to secure financing to produce the fourth picture to be produced by Andrew Stone; it being understood that each of the respective pledges of residual shares hereinabove referred to shall not require the pledge of residual shares of standard Capital Company, Littner Associates, or any one other than yourselves and present and future stockholders of your producing companies and the phrase "necessary" as used above shall be deemed to mean necessary in your discretion.

3. I shall receive credit as Associate Producer upon Hi-Diddle-Diddle and separate credit as Associate Producer upon the department store story if hereafter produced by Andrew Stone as one of the three motion pictures yet to be delivered to United Artists, it being understood that such credit shall be on a separate frame of the motion picture and on all positive prints thereof, although any casual omission or inadvertent failure or act

by any one not within your control, shall not be deemed a breach thereof.

4. It is expressly understood that I shall not be obligated to render services of any nature whatsoever in the future and shall not be deemed to be an agent, partner, representative, associate or affiliate of yourself or any of the producing companies hereafter concerned with the production of said three motion pictures yet to be delivered to United Artists, and I shall be held free and harmless of and from all personal liability whatsoever in connection with the production and/or distribution of each of said pictures.

5. The aggregate sum of \$20,000 invested by me in Hi-Diddle-Diddle shall be repaid from the recoupment of negative costs upon said motion picture together with interest at 6% from the dates of each advance made by me as soon as the prior liens of the banks, Standard Capital, DeLuxe Laboratories, and General Service Studios upon said motion pictures have been discharged, which sum of \$20,000 may be paid directly for my benefit and on my account to the Bank of America National Trust & Savings Association as provided in that certain agreement executed with Standard Capital Co. dated March 18, 1943.

6. It is understood that I hereby release each of you from any claims, demands, causes of action, rights or obligations accrued to the date hereof excepting only as expressly hereinabove defined and set forth and you do hereby release and forever discharge me of and from every claim, demand, cause of action, right or obligation accrued to the date hereof excepting only as expressly hereinabove defined and set forth, which you or either of you may have or hold against me.

7. Without in any manner restricting the personal obligations of Stone and Jackson hereinabove more specifically set forth and described, including the payment to me of each and every consideration more specifically set forth in paragraphs lettered (a) and (b) of the first page hereof, it is understood that insofar as Andrew Stone Productions, Inc. is concerned, this agreement is entered into as a compromise in good faith of a debt, claim, or controversy with myself as a stockholder thereof, and that no monies shall be paid to me by the said corporation except out of earned surplus, paid in surplus, or other surplus. It is further agreed that should it be desired to dissolve or liquidate Andrew Stone Productions, Inc.

that I shall waive any objection thereto and do hereby give my express consent to same, provided, of course that in the transfer of the motion picture Hi-Diddle-Diddle same shall be made subject to my rights as set forth in this agreement, and the moneys to be paid to me shall be subject to all other rights presently existing against the same picture.

8. Wherever and whenever the term financing costs is used, such term shall be deemed to take into consideration any interest, bonuses, percentage of profits, or other financing charges paid or to be paid in connection with such motion pictures, including such items as those amounts paid to Standard Capital Company, and the percentage of profits to Adolph Menjou on Hi-Diddle-Diddle, that which is to be paid to Littner Associates under a presently existing contract dated July 10, 1943, and to all other and similar items for such purpose that may be paid in good faith in the future, on the motion pictures included hereinabove.

9. The motion pictures referred to in this agreement other than Hi-Diddle-Diddle shall specifically be only the next three consecutive motion pictures produced by Andrew Stone for distribution through United Artists Corporation under and pursuant to the existing agreement dated February 2, 1943, between Andrew Stone Productions, Inc. and United Artists Pictures Corporation or any extensions, renewals, substitution, or replacement of said agreement; it being expressly understood that I shall not be entitled to any compensation or percentage or share of proceeds if any of said pictures are not so produced, it being understood further that I shall have no right to demand the production or delivery of such motion pictures.

Very truly yours,

APPROVED AND
CONFIRMED:

Edward F. Finney

Andrew Stone Productions Inc.

By

President

Andrew L. Stone, Individually

By

Secretary

Frederick Jackson,
Individually

The undersigned, United Artists Corporation, is not a party signatory to the foregoing agreement, but hereby accepts the provisions whereby it agrees to pay to Edward F. Finney directly that which is specified pursuant to paragraph lettered (b) of the first page of said agreement.

UNITED ARTISTS CORPORATION

By George A. Bagnall
Vice-President

In the United States Court of Appeals
for the Ninth Circuit

BETTY FINNEY AND EDWARD F. FINNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decisions of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

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ROBERT N. ANDERSON,
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Washington 25, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Statement	4
Summary of Argument.....	13
Argument:	
I. The taxpayer has failed to prove that he sustained deductible losses in 1945 in connection with his investments in the motion pictures "Strange Holiday" and "White Fury"	16
II. The Tax Court clearly did not err in holding that sums received by the taxpayer in 1945 from the motion picture production "Sensations of 1945" constituted ordinary income rather than capital gain.....	26
Conclusion	40

CITATIONS

Cases:

<i>Bartlett v. Commissioner</i> , 114 F. 2d 634.....	19
<i>Boehm v. Commissioner</i> , 326 U.S. 287.....	18
<i>Brown v. Commissioner</i> , 94 F. 2d 101.....	18
<i>Cass v. Helvering</i> , 83 F. 2d 841.....	18
<i>DeLoss v. Commissioner</i> , 28 F. 2d 803, certiorari denied, 279 U.S. 840.....	18
<i>Deputy v. du Pont</i> , 308 U.S. 488.....	18
<i>Gowen v. Commissioner</i> , 65 F. 2d 923, certiorari denied, 290 U.S. 687.....	18
<i>Green v. Commissioner</i> , 133 F. 2d 76.....	19
<i>Hadley Falls Trust Co. v. United States</i> , 110 F. 2d 887	19
<i>Helvering v. Northwest Steel Mills</i> , 311 U.S. 46....	18
<i>Jones v. Commissioner</i> , 103 F. 2d 681.....	18, 19
<i>Morton v. Commissioner</i> , 112 F. 2d 320.....	19
<i>Nelson v. United States</i> , 131 F. 2d 301.....	19
<i>New Colonial Co. v. Helvering</i> , 292 U.S. 435.....	18

II

Cases—Continued	Page
<i>Rand v. Helvering</i> , 116 F. 2d 929, certiorari denied, 313 U.S. 594.....	19
<i>Schmidlapp v. Commissioner</i> , 96 F. 2d 680.....	19

Statute:

Internal Revenue Code of 1939:

Sec. 22 (26 U.S.C. 1952 ed., Sec. 22).....	3
Sec. 23 (26 U.S.C. 1952 ed., Sec. 23).....	4

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,600

BETTY FINNEY AND EDWARD F. FINNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 30-47)¹ are not officially reported.

JURISDICTION

This petition for review (R. 50-61) involves federal income taxes for the taxable year 1945. On August 18, 1953, the Commissioner of Internal Revenue

¹ By order of this Court entered June 28, 1957 (R. 70), the taxpayers were permitted to submit this case on a typewritten transcript of the record and typewritten briefs. Accordingly, all record references herein are to the typewritten transcript of record on appeal. The typewritten copy of the record furnished to counsel for the Commissioner seems to contain many typographical errors, particularly in the taxpayer's testimony (R. 83-199), but we find none which seem to seriously alter the import of the taxpayer's testimony.

mailed to Mrs. Betty Finney and Edward F. Finney (herein referred to as the taxpayer)² statutory notices of deficiency asserting certain income tax deficiencies against them for the years 1944 and 1945. (R. 6-12, 20-26.) Within ninety days thereafter, and on October 12, 1953, the taxpayer and his wife filed separate petitions with the Tax Court for a redetermination of such deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 1-5, 15-19.) The cases were consolidated before the Tax Court for opinion and decision (R. 73), and the decisions of the Tax Court affirming the Commissioner's determination in part (R. 48, 49) were entered January 16, 1957. The case is brought to this Court by a petition for review (R. 50-61) filed April 3, 1957. Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the taxpayer has met his burden of proving that he sustained a deductible loss under Section 23(e) of the Internal Revenue Code of 1939, in 1945 in connection with his investment in the motion picture "Strange Holiday".

² The petitioners are husband and wife, residents of Los Angeles, California, who filed their separate income tax returns for the years involved on the community property basis with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. (R. 32-33.) The adjustments to income here involved relate to the income and deductions of the husband which were reported on their separate returns.

2. Whether the taxpayer has met his burden of proving that he sustained a deductible loss under Section 23(e) of the Internal Revenue Code of 1939, in 1945 in connection with his investment in the motion picture "White Fury".

3. Whether sums received by the taxpayer in the year 1945 from the motion picture production "Sensations of 1945" constituted ordinary income or long term capital gain.³

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]
General Definition. — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce,

³ The proceeding before the Tax Court also involved the questions: (1) whether sums received in 1944 and 1945 from the motion picture production "Hi Diddle Diddle" constituted ordinary income or long term capital gain; and (2) whether for the year 1945 the taxpayer and his wife were entitled to the statutory standard deduction from income as well as the itemized deductions claimed on their returns. On brief, after the hearing, the Commissioner conceded both of these issues and the original deficiencies determined by the Commissioner were reduced by the Tax Court accordingly, eliminating the deficiencies for 1944.

or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(e) *Losses by Individuals*.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

- (1) if incurred in trade or business; or
- (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The taxpayer has been engaged in various phases of the motion picture industry, including the production, direction, purchases and sales of motion pictures. (R. 33.)

1. In 1943 the taxpayer purchased a motion picture entitled "Strange Holiday" from a major studio. This picture starred Claude Rains, and dealt with an imaginary invasion and occupation of the United

States by the forces of Nazi Germany. It had originally been produced by an industrial corporation at a cost of approximately \$200,000, for exhibition to employees. It was then sold to the studio for approximately \$50,000. (R. 33.)

The purchase price paid by the taxpayer was \$4,000. In addition, changes were made to adapt the picture for commercial exhibition, at a cost of \$6,300, making a total outlay in the amount of \$10,600. Expenditures continued until at least some time in August of 1945. (R. 33.)

In 1945 the taxpayer was unsuccessful in attempts to distribute "Strange Holiday" for exhibition. Thereafter, he kept the picture in storage but without payment of storage fees, and made constant but non-intensive efforts to sell or distribute it. In 1951 it was sold for approximately \$2,100. The purchaser thereafter expended approximately \$20,000 in activities preliminary to exhibition, and did in fact exhibit "Strange Holiday". (R. 33-34.)

In their 1945 returns, the taxpayer and his wife each deducted one-half of the total amount representing costs and expenditures incurred by the taxpayer in respect of "Strange Holiday", on the theory that it had become worthless in 1945. The Commissioner disallowed such deductions, on the theory that such worthlessness in that year had not been established. (R. 34.)

2. In 1943 the taxpayer and A. W. Hackel purchased for \$3,000 distribution rights, copyrights and various other rights to a motion picture produced in Sweden, purportedly owned by a Swedish corpora-

tion known as Irefilm, and entitled "White Fury". In 1943 \$500 was paid and the balance of \$2,500 on September 21, 1945. These payments were made to an individual who had produced and directed that film, and who represented himself as fully authorized to sell it. (R. 34.)

The taxpayer paid the \$3,000 required by the terms of the sale and also incurred expenses in the amount of \$7,000 in readapting "White Fury", or a total outlay in the amount of \$10,000. Changes and readaptation began in 1943 and ended in the summer of 1945. A first screening took place in September or October of 1945. (R. 34.)

After the screening a representative of a Swedish business organization denominated A. B. Sandrew-Ateljeerna contacted the taxpayer. He alleged that Irefilm had become a bankrupt in 1939, that his principal owned all rights to "White Fury", and that the person who had purported to sell the film had no authority to do so. A series of correspondence and telephone conversations then commenced. An offer by the Swedish firm to permit the taxpayer, for \$10,000 to hold and exercise the rights purportedly transferred to him was rejected. (R. 34-35.)

While these communications were taking place the taxpayer sent the negative of "White Fury" to his agent in England to attempt to sell English rights in it. On December 3, 1945, an attorney representing the Swedish firm wrote to that agent, informing him of the existing situation, and alleging that the taxpayer had no rights in the film. A series of cor-

respondence then commenced between the agent and the representatives of the Swedish firm. (R. 35.)

At no time during 1945 did the taxpayer admit by word or deed the correctness of any claims adverse to his purported interest in "White Fury". When a seizure of the negative in the agent's possession was threatened, the taxpayer instructed his agent to resist such action. However, sometime in 1946 an injunction was secured and the negative seized. (R. 35.)

Thereafter, the taxpayer made only minor efforts to determine the liability of the person to whom the \$3,000 had been paid. No effort was made to collect any part of that amount. His investigation went no further than a general observation of the dwelling and automobile of that person, an inquiry of a mutual friend, which disclosed that the individual involved was a veteran of World War II and had recently married, and an oral statement by the seller that he did not have any money. (R. 35-36.)

On their 1945 returns the taxpayer and his wife each deducted one-half of the total amount representing costs and expenditures by the taxpayer in respect of "White Fury", on the theory that the taxpayer's interest therein had become worthless in 1945. The Commissioner disallowed that deduction, on the theory that such worthlessness in that year had not been established. (R. 36.)

3. In 1942 the taxpayer learned that Andrew Stone planned to produce a series of motion pictures through a corporation to be organized. He joined in this enterprise, and Andrew Stone Productions,

Inc. (hereinafter called "Productions"), was formed on September 16, 1942. The taxpayer lent Productions \$20,000, payable out of profits only, with interest at six per cent per annum. No note or other evidence of indebtedness was issued. However, because of the loan the taxpayer was permitted to purchase for \$20 twenty shares of common stock. As of January 8, 1943, total capital stock outstanding consisted of 100 shares held as follows (R. 36):

<u>Shareholder</u>	<u>No. of Shares</u>
Andrew Stone	60
Frederick Jackson	20
Edward Finney	20

Productions was financed by loans from banks and others. At the time of its formation it and the three stockholders entered into agreements respecting various matters, including services to be rendered by and salaries to be paid to each. The agreements respecting services and salaries were particularly pertinent to a motion picture entitled "Hi Diddle Diddle", subsequently produced by Productions. At least three such written agreements were executed on, respectively, December 31, 1942, March 10, 1943, and August 6, 1943. (R. 36-37.)

The three stockholders became officers, directors and employees. The taxpayer was employed as associate producer for "Hi Diddle Diddle". He assisted in obtaining financing, organized the production staff, helped cast part of the picture, engaged the office staff, and handled diverse other business matters. Jackson wrote the screen play, and Stone was employed as producer-director. The salary payable

to the taxpayer for his services in the production of "Hi Diddle Diddle" was \$12,000. That of Jackson and Stone was, respectively, \$20,000 and \$60,000. A substantial part of each of the foregoing salaries was deferred pursuant to written agreement. Production of "Hi Diddle Diddle" commenced in March of 1943, and the film was released in August of the same year. (R. 37.)

Shortly after Productions commenced activity persistent disagreements arose between the taxpayer and Stone. Attempts at reconciliation failed, until a written agreement was entered into dated September 23, 1943. Both parties were represented by counsel, and dealt at arm's length. (R. 37.)

At the time of the foregoing agreement the taxpayer had received neither interest nor principal on his loan, and \$9,000 remained unpaid of his salary for "Hi Diddle Diddle". The only asset then owned by Productions, aside from an insubstantial amount of cash, was that film. It was subject to substantial liabilities, but an agreement with United Artists provided for its distribution and exhibition. (R. 38.)

The settlement of September 23 was in the form of a letter addressed to Productions, Jackson and Stone, and signed by the taxpayer, Jackson and Stone, and, in turn, approved on behalf of Productions by its president and secretary. It read in part as follows (R. 38-40):

This will confirm our understanding that all previous agreements heretofore entered into between us including but not limited to those agreements dated as of December 31, 1942,

March 10, 1943, and August 6, 1943, are rescinded and cancelled and in addition to the salary of \$12,000 for my services rendered in connection with the production of the motion picture photoplay Hi-Diddle-Diddle of which sum I have heretofore received \$3,000 and the remainder of \$9,000 is to be paid to me concurrently with salary payments yet to be made to Andrew L. Stone and Frederick Jackson as negative costs of Hi-Diddle-Diddle, are recouped, I hereby agree to sell to you or your nominees all capital stock now held by me in Andrew Stone Productions, Inc., for the following consideration, to-wit:

(a) In addition to the sum of \$9,000 cash to be paid me from recoupment of the negative costs of Hi-Diddle-Diddle (constituting deferred salary and hereinabove referred to) I am to receive \$5,000 in cash within three weeks of the commencement of the principal photography upon the next picture to be produced by Andrew Stone together with the deferred payment of \$2,500.00 payable within two years from the release date of said picture and in addition thereto I am to receive a cash payment of \$5,000 within three weeks from the commencement of principal photography upon the second motion picture yet to be produced by Andrew Stone, and an additional cash payment of \$6,000 within three weeks from the commencement of principal photography upon the third picture yet to be produced by Andrew Stone for release by United Artists under the existing distribution agreement or any extension, renewal, replacement or substitution thereof.

(b) In addition to the cash payments herein-

above specified I am to receive directly from United Artists as distributor of Hi-Diddle-Diddle, 20% of the producer's net profits receivable by producer from the production and/or distribution of Hi-Diddle-Diddle and 12% of the producer's net profits receivable by producer from the production and/or distribution of each of the next three motion pictures produced by Andrew Stone for release by United Artists under the existing distribution agreement or any extension, renewal, replacement or substitution thereof. * * *

"Producer's net profits" are defined in the agreement as receipts less certain specified costs and expenses and all taxes. However, deductions for salaries to Jackson and Stone were limited for the purpose of computing "producer's net profits". (R. 40.)

The agreement further provided in part as follows (R. 40-41):

2. I consent to the pledge of my share of the residual values in Hi-Diddle-Diddle upon the same basis only as the pledge of all other residual shares as security for financing necessary to production of the second picture to be produced by Andrew Stone and I furthermore consent to the pledge of my share of the residual values upon the second picture yet to be produced by Andrew Stone for financing necessary to production of the third picture to be produced by Andrew Stone, upon the same basis as the pledge of all other residual shares, and I furthermore consent to the pledge of my share of the residual values in the third picture to be produced by Andrew Stone upon the same basis as all other residual shares, if it is necessary to

pledge the same to secure financing to produce the fourth picture to be produced by Andrew Stone; * * *

* * * *

4. It is expressly understood that I shall not be obligated to render services of any nature whatsoever in the future and shall not be deemed to be an agent, partner, representative, associate or affiliate of yourself or any of the producing companies hereafter concerned with the production of said three motion pictures yet to be delivered to United Artists, and I shall be held free and harmless of and from all personal liability whatsoever in connection with the production and/or distribution of each of said pictures.

5. The aggregate sum of \$20,000 invested by me in Hi-Diddle-Diddle shall be repaid from the recoupment of negative costs upon said motion picture together with interest at 6% from the dates of each advance made by me as soon as the prior liens of the banks, Standard Capital, DeLuxe Laboratories, and General Service Studios upon said motion pictures have been discharged, which sum of \$20,000 may be paid directly for my benefit and on my account to the Bank of America National Trust & Savings Association as provided in that certain agreement executed with Standard Capital Co. dated March 18, 1943.

The agreement also provided that the taxpayer would be credited as "associate producer", contained a general release by the taxpayer, and specified that it constituted the compromise of a controversy. It specifically limited the taxpayer's rights to the next three pictures to be produced after "Hi Diddle

Diddle" for distribution through United Artists. The foregoing payments were due only if such pictures should be produced. The taxpayer could not affirmatively require the production of any pictures. (R. 41-42.)

Sometime in 1943, after the foregoing agreement of September 23, Productions was liquidated and dissolved. Thereafter, Stone and Jackson produced a motion picture entitled "Sensations of 1945" through a corporation in which the taxpayer had no interest but which apparently inherited Productions' liabilities under the agreement of September 23. The taxpayer was entitled, inter alia, to 12 per cent of the "producer's net profits" on "Sensations of 1945". For reasons which represented arm's length considerations, he consented to the reduction of the share to 10.8 per cent. (R. 42.)

On the basis of the evidentiary facts found as restated above, the Tax Court found as ultimate facts that "Strange Holiday" and "White Fury" did not become worthless in 1945 and the taxpayer may not deduct as losses in that year the amounts of his investment therein; and further that the amounts received by the taxpayer on account of "Sensations of 1945" are not proceeds from the sale or exchange of capital assets, but are taxable as ordinary income. (R. 42-43.)

SUMMARY OF ARGUMENT

Deductions from income for federal income tax purposes are allowed only as a matter of legislative grace. Statutes authorizing such deductions are to

be strictly construed, and the burden is upon the taxpayer claiming a deduction to bring himself squarely within the provisions of the statute. In this case the taxpayers are claiming deductions under those provisions authorizing deductions for "losses sustained during the taxable year and not compensated for by insurance or otherwise" if incurred in trade or business or in a transaction entered into for profit, though not connected with the trade or business. Such deductions are allowable only for the year in which they are *sustained*. Here loss deductions were claimed on account of the alleged worthlessness of two motion pictures in the year 1945. The Commissioner determined that the alleged losses were not sustained in the year 1945 as claimed, and the burden was upon the taxpayer to prove the fact that the two motion pictures became worthless in that year.

The evidence relied upon by the taxpayer to meet his burden of proof consists almost entirely of the uncorroborated testimony of the taxpayer himself. It is vague and unconvincing. As to one picture, "Strange Holiday", alleged to have become worthless in 1945, the testimony shows only that considerable expenditures had been made, some as late as August, 1945, to adapt the picture for commercial exhibition, but that the taxpayer was unsuccessful in his efforts during the remainder of the year to get the picture exhibited commercially. Although contending that the film became valueless in 1945 he kept it, continuing his efforts, although apparently not very aggressively, to dispose of it or get it exhibited until

he sold it in 1951 for about \$2,100. The evidence, such as it is, fails to show that the picture became worthless in 1945. As to the other picture, "White Fury", the record is equally vague and unconvincing. Rights to the film ostensibly were acquired by the taxpayer upon payment of \$3,000 to an individual who allegedly was not authorized to sell it. After expending additional sums to adapt the film for exhibition the taxpayer was advised in 1945 of adverse claims to the film, and actively resisted such claims until the negative was seized by court order some time in 1946 in England. The taxpayer made no serious attempt to ascertain the liability of the individual from whom he had purportedly acquired rights in the picture, and apparently completely dropped the matter after the negative had been seized. The evidence does not warrant a finding that he sustained a deductible loss in 1945, however.

The evidence does not support the taxpayer's contention that payments received under the agreement of September 23, 1943, representing his share of "producer's net profits" from the motion picture "Sensations of 1945" constituted capital gains. The agreement was entered into to compromise and settle personal differences which had arisen between the taxpayer and Stone, president and majority stockholder of Andrew Stone Productions, Inc. It provided, among other things, in addition to the sale of the taxpayer's stock in Productions, for the cancellation of all existing agreements between the parties, mutual release of all claims and demands against each other, payment of deferred salary owing the

taxpayer and money advanced to the corporation by the taxpayer, division of the profits of a motion picture just produced and of not more than three motion pictures to be produced in the future, if and when produced, pledge of residual value of completed pictures for financing future pictures, etc. The amounts here in issue, being payments under the agreement in connection with a picture subsequently produced, do not represent payments on the sale of the taxpayer's stock in Productions but represent payments received in connection with other matters dealt with in the agreement of September 23, 1943, and are taxable as ordinary income.

The taxpayer's present contention that in addition to his Productions stock he also sold his interest in a partnership, which was a capital asset, is without evidentiary foundation and without merit. Likewise, taxpayer's argument, based on an obviously inadvertent inconsistency between one of the Tax Court's findings and its opinion and decision, is without merit, and the record as a whole fails to show error on the part of the Tax Court in finding and holding that the amounts in issue are taxable as ordinary income.

ARGUMENT

I

The Taxpayer Has Failed To Prove That He Sustained Deductible Losses In 1945 In Connection With His Investments In the Motion Pictures "Strange Holiday" and "White Fury"

In their separate income tax returns for the year 1945 the taxpayer and his wife claimed losses on

motion pictures in the amount of \$10,300, consisting of a claimed loss of \$5,300 on the motion picture "Strange Holiday" and a claimed loss of \$5,000 on the motion picture "White Fury", one-half of the claimed losses being deducted on each return. The Commissioner determined that no deductible loss was sustained during the year on account of these pictures and disallowed the deductions in determining the deficiencies here involved. (R. 10-11, 24-25.) It was stipulated in the Tax Court (R. 29) that the total sums spent by the taxpayers for "Strange Holiday" and "White Fury" were \$5,300 and \$5,000, respectively, so the amounts involved are not in issue.⁴

The facts, as best they can be gleaned from the evidence, with respect to the taxpayer's acquisition of these motion pictures, his efforts to exploit them for profit, and their ultimate disposition, are set out in the Tax Court's findings (R. 32-36) and in the foregoing statement. In its opinion the Tax Court concluded (R. 43-46), and we submit properly so, that the taxpayer had failed to prove that he had sustained a loss in 1945 in connection with his investment in either of these motion pictures.

It has long been settled that deductions from gross income are allowed for federal income tax purposes

⁴ These stipulated figures do not seem to be reconcilable with the findings of the Tax Court (R. 33, 34) that the taxpayer's total outlay for "Strange Holiday" was \$10,600 and for "White Fury" was \$10,000—exactly twice as much in each instance—but they correspond with the loss deductions disallowed by the Commissioner (R. 10-11, 24-25). This matter is not important to a determination of the issues here involved, however.

only as a matter of legislative grace, that statutory provisions authorizing deductions from income are to be strictly construed, and the burden is upon the taxpayer claiming a deduction to bring himself clearly within the provisions of the statute.⁵ In this case the deductions in issue are claimed under Section 23(e) of the Internal Revenue Code of 1939, *supra*, which provides, among other things, that in computing net income there shall be allowed as deductions, in the case of an individual, "losses sustained during the taxable year and not compensated for by insurance or otherwise", if incurred in trade or business or if incurred in a transaction entered into for profit, though not connected with the trade or business.

Losses are deductible under this section only for the year in which they are *sustained*, and the burden of proving that a loss occurred during the year for which a deduction is claimed is upon the taxpayer. *Boehm v. Commissioner*, 326 U.S. 287, 292-293; *Jones v. Commissioner*, 103 F. 2d 681, 684 (C.A. 9th), and cases cited. And where, as here, the claimed loss is based on alleged worthlessness of property, the burden is upon the taxpayer to show definitely that the property became worthless during the taxable year.⁶

⁵ *New Colonial Co. v. Helvering*, 292 U.S. 435, 440; *Deputy v. du Pont*, 308 U.S. 488, 493; *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49.

⁶ See *DeLoss v. Commissioner*, 28 F. 2d 803 (C.A. 2d), certiorari denied, 279 U.S. 840; *Gowen v. Commissioner*, 65 F. 2d 923 (C.A. 6th), certiorari denied, 290 U.S. 687; *Cass v. Helvering*, 83 F.2d 841 (C.A. 8th); *Brown v. Commis-*

The Tax Court having found that the taxpayer failed to prove worthlessness in 1945, the following statement of the Supreme Court in *Boehm v. Commissioner*, 326 U.S. 287, 293, is peculiarly applicable here:

But the question of whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be determined in the first instance by the Tax Court, the basic fact-finding and inference-making body. The circumstance that the facts in a particular case may be stipulated or undisputed does not make this issue any less factual in nature. The Tax Court is entitled to draw whatever inferences and conclusions it deems reasonable from such facts. And an appellate court is limited, under familiar doctrines, to a consideration of whether the decision of the Tax Court is "in accordance with law." 26 U.S.C. § 1141(c)(1). If it is in accordance, it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts. *Commissioner v. Scottish American Co.*, 323 U.S. 119.

The taxpayer was not represented by counsel at the hearing before the Tax Court, and his testimony

sioner, 94 F. 2d 101 (C.A. 6th); *Schmidlapp v. Commissioner*, 96 F. 2d 680 (C.A. 2d); *Jones v. Commissioner*, 103 F. 2d 681 (C.A. 9th); *Hadley Falls Trust Co. v. United States*, 110 F. 2d 887 (C.A. 1st); *Morton v. Commissioner*, 112 F. 2d 320 (C.A. 7th); *Bartlett v. Commissioner*, 114 F. 2d 634 (C.A. 4th); *Nelson v. United States*, 131 F. 2d 301 (C.A. 8th); *Rand v. Helvering*, 116 F. 2d 929, 933 (C.A. 8th), certiorari denied, 313 U.S. 594; *Green v. Commissioner*, 133 F. 2d 76 (C.A. 10th).

is understandably vague. Furthermore, the evidence consists almost entirely of the uncorroborated testimony of the taxpayer himself. It is clear from the transcript of the hearing, however (R. 75-200), that both the presiding Judge and counsel for the Commissioner assisted the taxpayer to the best of their ability in an effort to get a clear understanding of the facts. Despite this, however, the evidence does not warrant a finding that the taxpayer sustained losses as alleged with respect to his investment in the motion pictures "Strange Holiday" and "White Fury".

1. The taxpayer purchased the motion picture "Strange Holiday" from a major studio in 1943 at a cost of \$4,000. The film originally had been produced by General Motors Corporation, apparently after World War II started, at a cost of \$200,000, for exhibition to its employees. The picture starred Claude Rains, and dealt with an imaginary invasion and occupation of the United States by the forces of Nazi Germany. After the film had served its purpose the company sold it to a major studio for \$50,000, from which it was acquired by the taxpayer for \$4,000. The taxpayer had certain changes made in the film to adapt it for commercial exhibition, at a cost of \$6,300, making a total outlay in the amount of \$10,600.⁷ These expenditures continued until at least some time in August, 1945.

The taxpayer was unsuccessful in his efforts to distribute "Strange Holiday" for exhibition. Ac-

⁷ See fn. 4, *supra*.

according to his testimony (R. 83-99, 118-132) he apparently made no serious efforts to this end after 1945, merely keeping the film stored at a processing laboratory, without cost, until it was sold in 1951 for about \$2,100.

Taxpayer's principal contention (Br. 34-41) seems to be that because of the nature and theme of the picture it becomes worthless upon the cessation of hostilities between this country and Germany in the spring of 1945. The taxpayer did not specifically so testify, and there is no direct evidence of that fact in the record. The only evidence, in fact, as stated above, is the taxpayer's own vague self serving testimony. This consists mostly of his testimony concerning efforts to get the picture exhibited and uncorroborated statements of other individuals, all equally vague, which he sought to bring out at the hearing. He testified that his accountant charged the cost of the film off on his books as a loss at some indefinite time in 1945, but no books were produced to corroborate that testimony. If the value of the picture depended upon the public mood, as taxpayer seems to contend, that fact may well have been reflected in the low price for which he acquired it. The record fails to disclose that the film had any greater or less value at the beginning of 1945 than it did at the end of 1945, and since it starred Claude Rains the record indicates that the taxpayer still expected to realize something from his investment.

It seems quite clear from the taxpayer's testimony that he did not abandon the film in 1945, or at any other time prior to the time he sold it in 1951 for

\$2,100. And while his testimony seems to minimize his interest in the film after 1945 it also indicates that he had a continuing intention to exploit it for profit if he could. The fact that he sold it for \$2,100 in 1951 leaves little merit to his contention that it became valueless in 1945. Not only that, but the purchasers had confidence enough in the film to spend some \$20,000 on it with the idea of making it a commercial success.

As did the Tax Court (R. 43), we have carefully reviewed the entire record in this case, and we respectfully submit the Tax Court did not err in concluding that the taxpayer did not prove that he sustained a loss in 1945 on account of the motion picture "Strange Holiday" having become worthless in that year.

2. What has been said above with respect to the taxpayer's claim of a loss deduction on account of the alleged worthlessness of the motion picture "Strange Holiday" applies as well to his claim of a loss deduction on account of the alleged worthlessness of the motion picture "White Fury". Only the facts differ somewhat. The Tax Court found (R. 34) that in 1943 the taxpayer and another purchased for \$3,000 distribution rights, copyrights, and various other rights to "White Fury", a motion picture produced in Sweden and purportedly owned by a Swedish corporation known as Irefilm. A payment of \$500 was made in 1943 and the balance of \$2,500 was paid on September 21, 1945, these payments having been made to an individual who had produced and

directed the film and who represented himself as fully authorized to sell it.

In addition to the \$3,000 required by the terms of the sale, the Tax Court found that the taxpayer also incurred expenses in the amount of \$7,000, making a total outlay of \$10,000,⁸ in readapting the film for American distribution. These changes and readaptations began in 1943 and ended in the summer of 1945, and a first screening took place in September or October of 1945. After the first screening, a representative of a Swedish business organization denominated A. B. Sandrew-Ataljeerna contacted the taxpayer and claimed that Irefilm had become bankrupt in 1939, that his principal owned all the rights to "White Fury", and that the person who had purported to sell the film to the taxpayer had no authority to do so. A series of correspondence and telephone conversations then ensued, and an offer by the Swedish film to permit the taxpayer for \$10,000 to hold and exercise the rights purportedly transferred to him was rejected. In the meantime, the taxpayer had sent the negative of "White Fury" to England to attempt to sell English rights in it. On December 3, 1945, an attorney representing the Swedish film wrote to that agent, informing him of the existing situation, and alleging that the taxpayer had no rights in the film. A series of correspondence then followed between the agent and the representative of the Swedish firm. (R. 34-35.)

At no time during 1945 did the taxpayer admit by

⁸ See fn. 4, *supra*.

word or deed the correctness of any claims adverse to his purported interest in "White Fury". When a seizure of the negative in the agent's possession was threatened, the taxpayer instructed his agent to resist such action. However, sometime in 1946 an injunction was secured and the negative was seized. Thereafter, the taxpayer made only minor efforts to determine the liability of the person to whom the \$3,000 had been paid and no effort was made to collect any part of that amount. The taxpayer's investigation went no further than a general observation of the dwelling and automobile of that person, an inquiry of a mutual friend which disclosed that the individual involved was a veteran of World War II, and an oral statement of the seller that he did not have any money. (R. 35-36.)

The substance of the taxpayer's argument (Br. 41-47) seems to be that by the end of 1945 he realized he had made a foolish investment in buying "White Fury" and was willing to forget the whole matter, and therefore should be allowed to deduct the resultant loss. But the taxpayer's own testimony with respect to this issue (R. 99-108, 132-143, 150-151), does not support his claim that the loss was *sustained* in 1945. That testimony, like the rest of his testimony, is self serving and understandingly vague, is entirely uncorroborated, and definitely does not establish that he sustained an actual loss of his investment in 1945. Many of the cases cited above clearly show that the evidence relied upon here is not sufficient to prove that a loss was sustained in 1945 as claimed. This Court's opinion in *Jones v. Com-*

missioner, 103 F. 2d 681, seems particularly apropos here, but most especially the following statement (p. 685):

It is extremely uncertain, it is true, from the evidence produced by the taxpayer and, perhaps, from the findings of the Board [now the Tax Court], whether anything at all would ever be realized from the Securities Company stock. We are not, however, positive that it became absolutely worthless in 1933, or that it had a less value in 1933 than in 1932, or, for that matter, a greater value, or that 1934 was not the year, or, even, 1935. No showing has been made sufficient to justify us in ignoring the presumption of correctness in the Commissioner's ruling, or to hold there was an entire lack of substantial evidence to support the findings of the Board. Moreover, if there is opportunity for opposing inferences, the judgment of the Board controls. [Citations.]

While it is also quite true "that a loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment.", and that "The taxing act does not require the taxpayer to be an incorrigible optimist." [Citations], nevertheless, cessation of business is not conclusive, though, of course, not every possibility of value will be considered. [Citation.] A real loss is sustained only when all chances or possibilities of collection have been effectively destroyed. [Citations.]

We submit that in the instant case all chances or possibilities of the taxpayer recovering his investment in "White Fury" had not been effectively destroyed

by the end of 1945 and that accordingly the Tax Court did not err in sustaining the Commissioner's disallowance of the claimed deduction on account of "White Fury" becoming worthlessness in that year.

II

The Tax Court Clearly Did Not Err In Holding That Sums Received By the Taxpayer In 1945 From the Motion Picture Production "Sensations of 1945" Constituted Ordinary Income Rather Than Capital Gain

In 1942 the taxpayer joined with Andrew Stone and Frederick Jackson to form Andrew Stone Productions, Inc. (herein called Productions), incorporated under the laws of California on September 16, 1942, to produce a series of motion pictures, with the taxpayer and Jackson each owning a 20% stock interest (represented by 20 shares each) and Stone owning a 60% stock interest (represented by 60 shares), all three becoming officers, directors and employees. The evidence does not show what Stone or Jackson paid for their stock, but the taxpayer paid \$20 for his 20 shares and loaned Productions \$20,000, repayable out of profits only, with interest at 6% per annum, no note or evidence of indebtedness being issued therefor. In addition to this loan, Productions was financed by loans from banks and others.

At and after the time Productions was formed, it and its three stockholder-officers entered into agreements, none of which were introduced in evidence, respecting various matters, including services to be rendered by and salaries to be paid to each. The agreements respecting salaries and services were par-

ticularly pertinent to the first motion picture, entitled "Hi Diddle Diddle", subsequently produced by Productions. Three such written agreements, none of which are in evidence, were executed on December 31, 1942, March 10, 1943, and August 6, 1943, respectively. (R. 36-37.) The salaries payable to the taxpayer, Jackson and Stone, respectively, for their services in the production of "Hi Diddle Diddle" were \$12,000, \$20,000 and \$60,000. A substantial part of each of these salaries was deferred pursuant to written agreement. Production of "Hi Diddle Diddle" was commenced in March of 1943 and the film was released in August of that year.

Apparently it was the intention of the stockholders at the time Productions was formed that at least three or four pictures would be produced by the corporation. However, shortly after Productions commenced activity persistent disagreements arose between the taxpayer and Stone which finally culminated in a written agreement between the parties dated September 23, 1943 (Ex. 2, printed in full as an appendix to taxpayer's brief), the material parts are set out in the Tax Court's findings (R. 38-41), which was in the form of a letter addressed to Productions, Stone and Jackson, and signed by the taxpayer, Stone and Jackson individually.

The agreement of September 23, 1943, rescinded and cancelled all other agreements theretofore entered into between the parties, and pursuant to that agreement (Ex. 2, Pet. Br. Appendix A, p. A-4) the taxpayer released or sold to the corporation, Stone

and Jackson, his 20 shares of stock in Productions and also released them—

from any claims, demands, causes of action, rights or obligations accrued to the date hereof excepting only as expressly hereinabove defined and set forth and you do hereby release and forever discharge me of and from every claim, demand, cause of action, right or obligation accrued to the date hereof excepting only as expressly hereinabove defined and set forth, which you or either of you may have or hold against me.

The considerations enumerated in the agreement of September 23, 1943, in addition to the payment of \$9,000 in deferred salary, payable to him out of the proceeds of "Hi Diddle Diddle", were that the taxpayer was to receive certain fixed cash payments from the next three motion pictures to be produced by Andrew Stone for release by United Artists under their existing distribution agreement and to receive directly from United Artists, as distributor of "Hi Diddle Diddle", 20% of the producer's net profits receivable by the producer from the production and/or distribution of "Hi Diddle Diddle", and 12% (later reduced to 10.8% by agreement) of the producer's net profits receivable by producer from the production and/or distribution of each of the next three motion pictures to be produced by Andrew Stone for release by United Artists under their existing distribution agreement. "Producer's net profits" as therein used was defined as any and all sums directly or indirectly accruing or payable to the pro-

ducer from the production and/or distribution of each of such next three motion pictures after deducting certain specified costs and expenses, but limiting the amounts payable to Stone, Jackson, or Productions as services of producer, director, writers, for story, and for screen play. (R. 39-40.)

Under the agreement of September 23, 1943, the taxpayer also agreed to the pledge of his share of the residual values in "Hi Diddle Diddle", on the same basis only as the pledge of all other residual shares, as security for financing necessary to production of the second picture to be produced by Stone; to the pledge of his residual values of the second picture on the same basis for financing necessary to the production of the third picture; and to the pledge of his residual values of the third picture on the same basis for financing necessary to the production of the fourth picture.

Other than his share in the profits of "Hi Diddle Diddle", the taxpayer was not entitled to any further payments under the agreement of September 23, 1943, and he could not compel the others to produce any further pictures.

Some time in 1943 subsequent to the above agreement Productions was dissolved and liquidated and a new corporation was formed by Stone and Jackson, and possibly others, in which the taxpayer had no interest, but which apparently inherited the obligations of Productions under the agreement of September 23, 1943. Stone and Jackson produced the motion picture "Sensations of 1945" under the aegis of this new corporation, and it is the amounts received

by the taxpayer in 1945 from "Sensations of 1945" under this contract that are here in controversy.

It was stipulated below (R. 29) that during the years 1944 and 1945 the taxpayers received \$12,500 and \$39,862.46, respectively, from the motion picture "Hi Diddle Diddle", and that in 1945 they received the sum of \$10,824 from the motion picture "Sensations of 1945". Treating these payments as capital gains, the taxpayer and his wife reported one-half thereof, divided equally between them, in their separate returns for 1944 and 1945. In determining the deficiencies for those years the Commissioner treated these payments as ordinary income taxable under Section 22(a) of the 1939 Code, *supra*. (R. 8-11, 22-25.)

At the trial before the Tax Court it was shown that at the time of the agreement of September 23, 1943, the only asset then owned by Productions, aside from an insubstantial amount of cash, was the film "Hi Diddle Diddle". No other picture had been started, and so far as the record shows, this film, or the proceeds to be realized from it, represented the entire value of the capital stock of Productions at the time the taxpayer purportedly sold his 20 shares to the corporation. In his brief filed in the Tax Court after the hearing the Commissioner, without explanation, conceded that the amounts received by the taxpayer in 1944 and 1945 from the motion picture "Hi Diddle Diddle" constituted capital gain, leaving for determination by the Tax Court only the question whether amounts received from the motion picture "Sensations of 1945" constituted ordinary income or

capital gains. The Tax Court sustained the Commissioner's determination on this issue. (R. 46-47.)

At the hearing before the Tax Court the taxpayer insisted that all sums received by him under the agreement of September 23, 1943, represented payments for the 20 shares of Productions stock which he had sold to the corporation. (R. 110-116, 152-199.) While so insisting, however, his answers on cross examination clearly indicated otherwise. (R. 152-199.) For instance, he explained that one reason for paying him more than what obviously was the value of his stock at the time was because Productions, Stone and Jackson needed his share of the residual value of "Hi Diddle Diddle" to finance subsequent pictures, and that the distribution agreement with United Artists had something to do with it, (R. 161, 163-168); that he was protecting his interest in future pictures to be produced by the company, or his right to participate in future income from them (R. 170-172, 186-189).

Counsel now take the position that the agreement of September 23, 1943, being with Stone and Jackson as well as with Productions, sets forth not only the sale of taxpayer's Productions stock, but also the complete divorcement of the taxpayer from the activities of Stone and Jackson; in short, "it represents not only a sale of stock but also a dissolution of a joint venture for the production and distribution of pictures—a joint venture or partnership composed of Stone, Jackson and petitioner" (Br. 11) and that the basic error of the Tax Court "was in failing to see that the consideration paid and promised to

petitioner was for more than merely stock in a corporation which at that time had produced only one picture" (Br. 11).⁹ Rather, counsel insist, the consideration "was also for his surrender of a partnership interest in a venture which not only had produced the one picture, but also had a valuable distribution agreement," the services of skilled movie principals, and a projected life of three or four pictures. (Br. 11), and on the basis of these and other assumptions argue that the amount in issue represented capital gain because it represented payments for the sale of a partnership interest or an interest in a joint venture (Br. 10-22).

If the evidence would support this thesis it might be worthy of more consideration. But the evidence does not establish a partnership or joint venture between the taxpayer, Stone and Jackson. That can only be surmised. There were a number of agreements, at least three of which were in writing and which were specifically rescinded and canceled by the agreement of September 23, 1943. Further than that the record shows naught. None of the agreements were put in evidence, and the taxpayer failed to explain their terms or who were parties to them. The only thing definite to be gained from the taxpayer's testimony is that their agreement as to salaries was limited to the one picture, "Hi Diddle Did-

⁹ The Tax Court did not so err. It recognized that the agreement dealt with far more than the mere purchase and sale of stock and that the payments in issue were not for stock, adding that the taxpayer "has not shown respondent to be in error with respect to this issue". (R. 47.)

dle". It can also be gathered from the taxpayer's testimony that at the time Productions was formed the parties planned to produce three or four pictures, but the testimony negates any definite agreement to that effect. Instead, it seems more reasonable to conclude from taxpayer's testimony that each picture to be produced by Productions would be dealt with separately.

The record is equally devoid of any definite evidence concerning a "valuable distribution agreement". The last paragraph of the agreement of September 23, 1943 (Pet. Br. Appendix A, p. A-5), refers to a distribution agreement dated February 2, 1943, "between Andrew Stone Productions, Inc. and United Artists Pictures Corporation", and the payments which the taxpayer was to receive under the agreement of September 23, in addition to the \$9,000 of deferred salary and repayment of the \$20,000 loan with interest, are limited to the stipulated payments from the next three pictures produced by Stone (Pet. Br. Appendix A, p. A-1) "for release by United Artists under the existing distribution agreement or any extension, renewal, replacement or substitution thereof". The terms of the agreement, the taxpayer's interest in it, or its value to the corporation are not in evidence and cannot even be surmised. In any event, there is nothing to show that the distribution agreement was an asset of any partnership or joint venture of which the taxpayer was a member, and there is nothing in the agreement to show that the taxpayer was selling an interest in the distribution agreement.

We agree with counsel that the agreement of September 23, 1943, shows that taxpayer surrendered more than his stock (Br. 11), but we cannot agree "that this more was a partnership interest" (Br. 11-12). The taxpayer's testimony indicates that his differences with Stone were personal and that the latter was interested primarily in getting the taxpayer out of his hair while the taxpayer was primarily interested in sharing in the profits from future movies produced by Stone. This is essentially what the agreement accomplished. All previous agreements between them to which the taxpayer was a party were rescinded and canceled; the taxpayer surrendered his stock in Productions, thus eliminating himself as an officer and director; the parties mutually released each other from all claims and demands other than as might be bottomed on the agreement of September 23rd; the taxpayer was not to render any services of any nature whatsoever in the future and not to be deemed an agent, partner, representative, associate or affiliate of Stone, Jackson, or Productions, etc., in the production of the next three pictures covered by the contract; the taxpayer continued to commit his residual values in finished pictures to the financing of the next picture; and he was to continue to receive his percentages of the next three pictures produced. The taxpayer's percentage of participation in producer's net profits was fixed at 12% (later reduced to 10.8%) instead of the 20% to which he was entitled before, and by giving up his connection with the corporation the taxpayer removed himself as an officer and director, and also

gave up any right to future salaries, but he was to get certain fixed lump sum payments from future pictures covered by the agreement which may have been intended as partial reimbursement for such lost compensation.

When the agreement is considered as a whole, and particularly in connection with taxpayer's testimony, the amounts received by the taxpayer from "Sensations of 1945" clearly constitute ordinary income. So far as the record shows, they represent a part of the "producer's net profits" payable to him under that agreement, and are in lieu of what he would have received as his share of such profits in the absence of the agreement of September 23, 1943. In any event, we submit, as held by the Tax Court (R. 47) it has not been shown that the Commissioner erred in determining it to be ordinary income. There is no basis in the record for holding that the amount involved represents payment for a capital asset. We find no merit to counsel's repeated assertion (Br. 11, 12, 16, 18) that by the agreement of September 23, 1943, the taxpayer sold a partnership interest as well as his stock in Productions. Not only is there no evidence that a partnership existed, but there is no evidence to support the broad assertion (Br. 18) that such partnership interest included an interest in the good will, facilities and talents of Productions and of Stone and Jackson, including a right to participate not only in the productions and profits of "Hi Diddle Diddle" but also in the production of three or four additional films to be produced by Stone (not Productions) and to share in the proceeds thereof. The

agreement provided for taxpayer's participation in the financing of the next three pictures produced by Stone, and for his sharing in the profits—but only if there were subsequent pictures and if they made a profit—without his participation as an officer, director, or employee of the corporation.

Counsel finally argue (Br. 22-33) that even assuming that the taxpayer has shown only the sale of stock in Productions and not a sale of a partnership interest in addition, the moneys received from the film "Sensations of 1945" constitute a capital gain rather than ordinary income. This final argument is based primarily upon the Tax Court's ultimate finding that (R. 43)—

The amounts received by petitioner on account of "Sensations of 1945" represent amounts received as consideration for the sale or transfer of his shares of stock in productions. They are not proceeds from the sale or exchange of capital assets, and are taxable as ordinary income.

As we have stated above we are in agreement that the contract of September 23, 1943, covers more than a sale of the taxpayer's stock in Productions, but, as already pointed out, what he parted with in addition is not shown to be an interest in a partnership.

Counsel have rightly called this finding to this Court's attention. It certainly is confusing and contradictory to say the least. We have no explanation for the use of this language if it was deliberately chosen by the Judge who wrote the findings and opinion, because the first sentence is inconsistent with the evidentiary findings relating to this issue (R. 36-

42) and the discussion and holding on this issue in the opinion (R. 46-47). It seems more probable that the words "do not" were inadvertently omitted following "Sensations of 1945" in the final promulgation of this part of the Tax Court's findings and opinion. First, the Tax Court recognized that if the amounts in issue represented a part of the sale price of (or consideration for) taxpayer's stock in Productions they would qualify for treatment as long term capital gain. (R. 46.) The opinion (R. 47) goes on to say, however, that the agreement of September 23, 1943, "dealt with far more" than the mere transfer of title to the taxpayer's shares of stock in Productions. The opinion then enumerates some of the additional matters dealt with in the agreement, including taxpayer's general release of the parties from prior agreements; his agreement permitting the other parties to pledge, where necessary, *inter alia*, amounts due him with respect to "Hi Diddle Diddle" for financing the next motion picture to be produced; taxpayer's rights, in addition to those of a stockholder, to participate in profits from future pictures to be produced, and to be employed in such production; and added that the taxpayer had admitted on brief that factors causing Stone to agree to provisions giving him a share in pictures subsequently to be made included general release and the right to pledge the taxpayer's residual value of "Hi Diddle Diddle". Payments received from a "producer's share of profits" on pictures subsequently made, in consideration for such undertakings by the taxpayer, certainly could not qualify for

capital gain treatment. The Commissioner had already admitted on brief that payments received under this agreement from "Hi Diddle Diddle" were entitled to capital gain treatment, and since the Tax Court was unable to agree with the taxpayer's contention respecting payments received from "Sensations of 1945" it added that "He [taxpayer] has not shown respondent to be in error with respect to this issue." (R. 47.) Again, after adverting to the fact that the taxpayer appeared without the aid of counsel, and was undoubtedly hampered by that circumstance in the presentation of his case, the court added further that (R. 47) "Nonetheless, we are bound by the record as made. On the basis of that record, we cannot hold that respondent erred in treating as ordinary income the amount received in 1945 in respect of 'Sensations of 1945'."

Under all the circumstances it is obvious, we submit, that the Tax Court did not intend the first sentence of its concluding finding, which is inconsistent with the second sentence and also its opinion and decision, to be cast in the form it appears in the record, and we further submit the apparent inconsistency, so obviously inadvertent, does not furnish a basis for reversal of the Tax Court's decision on this issue.

While counsel rely primarily upon this apparent inconsistency in the Tax Court's finding, their argument under this heading (Br. 22-31) contains unwarranted premises or conclusions. First, it treats the Tax Court's conclusion as resting on the belief that the taxpayer's shares of stock could not be given a value greater than a 20% interest in "Hi Diddle

Diddle", adding that it is apparent that the trial court believed that when majority shareholders buy out a minority shareholder, as here, the latter is restricted in the consideration paid him for his stock to an amount equal only to his pro rata interest in a particular tangible asset which the corporation may then have. No such matter was before or passed upon by the Tax Court. The only issue for decision, other than the loss issues, was whether the amounts received from "Sensations of 1945" represented capital gain or ordinary income. Payments received from "Hi Diddle Diddle" were also included in this issue at the time of the trial, and both the trial Judge and counsel for the Commissioner, since taxpayer was not represented by counsel, asked him many questions in an effort to get a clearer idea as to what the payments represented. There is no basis in the record or the opinion, however, for the above premise on which counsel's ensuing argument is pitched. (Br. 22-33.)

The argument then proceeds, primarily on the basis of assumptions not based on evidence, because, as we have stated, no such issue was before the Tax Court, to attempt to demonstrate that taxpayer's stock had a value in excess of the 20% interest in "Hi Diddle Diddle", with the alleged result that the payments here involved were consideration for the taxpayer's stock. The evidence does not support this part of the taxpayer's argument.

To sum up the issue here involved, as stated several times above, is whether the payments received from "Sensations of 1945" by the taxpayer in 1945,

pursuant to the agreement of September 23, 1945, represent capital gain or ordinary income, the taxpayer originally contending but failing to convince the Tax Court, that they were part of the consideration for his Productions stock. Taxpayer is now contending, mainly, but without any evidentiary support, that payments received by the taxpayer were consideration for the sale of a partnership interest as well as his Productions stock. We submit, however, that there is not sufficient evidence to warrant a finding that the amounts in issue were received as consideration for the sale of any kind of a capital asset, and the Tax Court correctly found (R. 43) that "They are not proceeds from the sale or exchange of capital assets, and are taxable as ordinary income".

CONCLUSION

The decisions of the Tax Court are correct. They are supported by the facts and the law and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
FRED E. YOUNGMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

OCTOBER 1957.

No. 15603

United States
Court of Appeals
for the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corpora-
tion and DONALD H. NOTEBOOM,

Appellants,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 22)

FILED

DEC 20 1957

PAUL E. GIBBEN, CLERK

Appeal from the United States District Court for the
District of Oregon

No. 15603

**United States
Court of Appeals**
for the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corpora-
tion and DONALD H. NOTEBOOM,

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**Appeal from the United States District Court for the
District of Oregon**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Certificate of Clerk	17
Judgment Order	12
Motion for New Trial	15
Notice of Appeal	16
Order Denying New Trial	16
Pretrial Order	3
Statement of Points, Appellants'	20
Transcript of Proceedings	23
Instructions to the Jury	176
Witnesses:	
Burton, Roy	
—direct	94, 118
—cross	99
Clancy, Sherman E.	
—direct	149
—cross	155

INDEX

PAGE

Witnesses—(Continued):

Davis, Dr. Edward W.

—direct 84

—cross 91

Hazelwood, William

—direct 72

—cross 79

—redirect 81, 83

—recross 83

Noteboom, Donald H.

—direct 24, 164

—cross 47, 165

—redirect 51

—recross 52

Ogden, E. B.

—direct 157

—cross 160

Sadoff, Hyman A.

—direct 101, 119

—cross 129

—redirect 132

—recross 135

Taylor, Harold L.

—direct 56

—cross 67

—redirect 71

INDEX

PAGE

Witnesses—(Continued):

Teller, Dr. George (Deposition)

—direct	103
—cross	109
—redirect	115
—recross	116

Woodworth, Larry Curtis

—direct	137
—cross	141
—redirect	148

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Portland 4, Oregon,
For Appellees.

In the United States District Court
for the District of Oregon

Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,

Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a
Nevada Corporation,

Defendant.

PRETRIAL ORDER

The above causes came on regularly for pretrial
conference before the Honorable Gus J. Solomon

on Monday, February 25, 1957 (the parties having heretofore stipulated that the causes be consolidated for trial); Converse Trucking Service, Donald H. Noteboom and Samack, Inc., appeared by Charles H. Crookham; the intervening plaintiffs, The Home Insurance Company and Phoenix Insurance Company, appeared by Robert Clapperton and Irving Rand; defendant appeared by John Gordon Gearin.

The parties, with the approval of the Court, agree to the following

Statement of Facts

I.

Converse Trucking Service is a California corporation; Donald H. Noteboom and Samack, Inc., are residents of Oregon; The Home Insurance Company is a New York corporation; Phoenix Insurance Company is a Connecticut corporation; and defendant is a Nevada corporation.

II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

III.

On or about the 7th day of March, 1956, a collision occurred between a tractor and two trailers operated by Converse Trucking Service and a certain truck and trailer owned and operated by Pacific Intermountain Express Co. Said collision occurred on Oregon State Highway No. 58 near the Crescent Lake Junction, as a result of which the above

described motor vehicles received property damage and plaintiff Noteboom, received personal injuries.

IV.

Intervening plaintiff, The Home Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samack, Inc., against collision or upset for all damages in excess of \$1,000. Intervening plaintiff, Phoenix Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samack, Inc., against collision or upset for all damages in excess of \$1,000.

Following said collision each intervening plaintiff loaned to Samack, Inc., the sum of \$2,384.73, with the understanding and agreement that Samack, Inc., would repay said sums from, and only from, the recovery made by it from the party or parties legally responsible for said damage. As security for the said agreement of repayment plaintiff, Samack, Inc., pledged to intervening plaintiffs its said claim for said damaged tractor against the defendant.

Contentions of Converse Trucking Service,
Donald H. Noteboom and Samack, Inc.

I.

That at the time of the occurrence of the accident as aforesaid, the equipment operated by Donald H. Noteboom consisted of a tractor and two trailers; that the tractor operated by Donald H. Noteboom was owned by Samack, Inc., and was under lease

to and under the exclusive possession and control of Converse Trucking Service, and that Donald H. Noteboom was an agent and employee of the Converse Trucking Service; that the two trailers pulled by the aforesaid tractor were owned by Converse Trucking Service.

II.

That the sole and proximate cause of the collision between the vehicles operated by Donald H. Noteboom and the vehicle of Pacific Intermountain Express Co. was the carelessness, recklessness and negligence of Pacific Intermountain Express Co. in the operation of its vehicle in the following particulars:

a. In operating said vehicle at a high, dangerous and reckless rate of speed under the circumstances then and there existing;

b. In failing to maintain a proper lookout, and especially a lookout for the vehicle operated by Donald H. Noteboom;

c. In failing to yield one-half of the highway to the vehicle operated by Donald H. Noteboom;

d. In failing to drive as close as possible to the right edge of said highway;

e. In failing to have the vehicle under proper or any control.

III.

That as a proximate result of the negligence of Pacific Intermountain Express Co., these parties have been damaged as follows:

1. Converse Trucking Service has been damaged due to the foregoing to the extent of \$2,026.68.

2. Samack, Inc., has been damaged as a result of the foregoing to the extent of \$11,456.37.

3. That Donald H. Noteboom has been damaged as a result of the foregoing by suffering personal injury in that he sustained multiple contusions and abrasions of the body, laceration of the left knee and left elbow, acute sprain of the left ankle, laceration proximal to the metacarpal phalangeal joint between the ring and middle finger on the dorsum of the left hand; a concussion of the head, and required services of physicians and surgeons, and was generally damaged in the sum of Thirty-five Thousand Dollars (\$35,000.00) general damages, and has been unable to work for one month and sustained special damages for loss of wages for one month in the sum of Seven Hundred Fifty Dollars (\$750.00), and has incurred medical and hospital expenses and sustained special damages in the sum of Two Hundred Forty-one and 60/100 Dollars (\$241.60); that the injuries complained of as aforesaid are permanent.

* * *

Pacific Intermountain Express Co. denies the foregoing.

Stipulation as to Intervening Plaintiffs

The parties hereby stipulate that in the event of a verdict or the finding of the Court herein to the effect that Samack, Inc., is entitled to the recovery of any damages for injuries to said tractor that a

judgment in favor of the intervening plaintiffs and against the defendant shall be entered herein to the extent of said damages up to, but not exceeding the sum of \$4,769.46, and that the amount of said judgment in favor of the intervening plaintiffs shall be deducted from the award, if any, so made in favor of Samack, Inc.

Contentions of Pacific Intermountain
Express Co.

I.

The accident to which reference has heretofore been made was caused proximately by the negligence of Donald H. Noteboom in the following particulars:

- a. He operated the tractor and two trailers at an excessive rate of speed;
- b. He failed to keep his rig under proper control;
- c. He failed to drive the rig on the right half of the highway;
- d. He failed to maintain proper lookout.

II.

As a proximate result of the foregoing negligence of Donald H. Noteboom, the truck and trailer of defendant were damaged and depreciated in value, and Pacific Intermountain Express Co. lost the use thereof, thereby suffering damage in the sum of \$1,501.52.

The foregoing contentions of Pacific Intermountain Express Co. are denied by Converse Trucking Service, Donald H. Noteboom and Samack, Inc., except they admit the amount of damages sustained by Pacific Intermountain Express Co.

Issues to Be Determined

1. Was defendant guilty of negligence in one or more of the particulars charged, and if so, was such negligence a proximate cause of the accident?

2. Was Donald H. Noteboom guilty of negligence in any particular as charged, and if so, was such negligence a proximate cause of the accident?

3. Was Samack, Inc., at the time and place of the accident legally responsible for the acts and conduct of Donald H. Noteboom?

4. What are the amount of damages sustained by (a) Converse Trucking Service; (b) Samack, Inc., and (c) Donald H. Noteboom, (d) Pacific Intermountain Express Co.?

Exhibits

The following exhibits have been identified, the parties agreeing that further identification is not necessary, but that objection to any of said exhibits shall be made only on the grounds of materiality, relevancy or competency:

I. Exhibits of Converse Trucking Service

- (1) Deposition of Sherman E. Clancy;
- (2) Repair estimate of Fruehauf Trailer Co.;
- (3) Photographs (a) through (), inclusive.

II. Exhibits of Samack, Inc.

- (9) Lease agreement with Converse Trucking Service;
- (10) Photographs (a) through (), inclusive;
- (11) Statement of truck expenses.

* * *

III. Exhibits of Donald H. Noteboom

- (17) Bill of Edward Davis, M.D.;
- (18) Bill of Drs. Rees, Haslinger, Nichols & Bline;
- (19) Deposition of Dr. George W. Teller.

* * *

IV. Exhibits of Pacific Intermountain Express Co.

- (22) Sealed exhibit for impeachment purposes only;
- (23) Photographs (a) through (1), inclusive;
- (24) Map;
- (25) Depositions of Donald H. Noteboom and Hy Sadoff;
- (26) Tachograph cards;
- (27) Driver's log;
- (28) Tractor service report;
- (29) Complaint—Converse Trucking Service vs. Pacific Intermountain Express Co.;
- (30) Complaint—Samack, Inc., vs. Pacific Intermountain Express Co.
- (31) Reserved for medical reports.

V. Exhibits of Home Insurance Company and
Phoenix Insurance Company

- (32) Loan receipt of Home Insurance Com-
pany;
- (33) Loan receipt of Phoenix Insurance Com-
pany.

It Is Hereby Ordered that the foregoing is the
Pretrial Order in the above-entitled cause, and that
it supersedes the pleadings which are hereby
amended to conform hereto, and that the Pretrial
Order shall not be amended, except by consent or
by Order of the Court to prevent manifest in-
justice.

March 20, 1957.

/s/ GUS J. SOLOMON,
U. S. District Judge.

The Foregoing Form of Pretrial Order Is
Hereby Approved:

/s/ C. S. CROOKHAM,
Of Attorneys for Converse Trucking Service, Sam-
ack, Inc., and Donald H. Noteboom.

/s/ ROBERT CLAPPERTON,
Of Attorneys for Intervening
Plaintiffs.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Pacific In-
termountain Express Co.

Lodged March 11, 1957.

[Endorsed]: Filed March 20, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant
and Counterclaimant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned Judge of the above-entitled Court and a jury on Wednesday, March 20, 1957, and continued until Thursday, March 21, 1957. Converse Trucking Service and Donald H. Noteboom appeared by Vergeer & Samuels, their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. A jury was duly empaneled and sworn, following which opening statements were made and evidence on behalf of all parties was introduced. When all parties had rested and arguments to the jury were made, the Court with the consent of all parties submitted special interrogatories in the form of a ver-

dict to the jury, which were answered by the jury as follows:

“We, the jury, answer the special interrogatories as follows:

“1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co., truck and trailer, guilty of negligence?

“No.

“(b) Was Donald H. Noteboom guilty of negligence which cause or contributed to the accident?

“No.

“2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service, truck and trailer, guilty of negligence?

“No.

“(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident?

“No.

“3. What damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident?

“\$8,711.00.

“4. What damages did Samaek, Inc., sustain?

“\$7,529.00.

“Dated this 21st day of March, 1957.

“VICTOR FERGUSON,
“Foreman.”

Said special verdict was received and filed, and based thereon the Court, being fully advised in the premises:

Now Orders that Converse Trucking Service and Donald H. Noteboom take nothing by their respective complaints, and the Pacific Intermountain Express Co. have judgment in its favor with regard to the claims of Converse Trucking Service and Donald H. Noteboom; and

It Is Further Ordered that Pacific Intermountain Express Co. take nothing by its counterclaim against Converse Trucking Service and Donald H. Noteboom; and

It Is Further Ordered that Converse Trucking Service and Donald H. Noteboom take judgment in their favor against Pacific Intermountain Express Co. with respect to said counterclaim.

Dated, this 27th day of March, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION

Come now Donald H. Noteboom, Samack, Inc., an Oregon Corporation, The Home Insurance Company, a New York Corporation and Phoenix Insurance Company, a Connecticut Corporation, and Converse Trucking Service, a corporation, and move the Court for an Order setting aside the judgment entered herein, and the findings of the jury with respect to the considerations of negligence submitted to it upon which said judgments are based, upon the following grounds:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the judgment.

IRVING RAND,
ROBERT CLAPPERTON,
VERGEER & SAMUELS,

By /s/ DUANE VERGEER,
Of Attorneys for Converse Trucking Service,
Donald H. Noteboom and Samack, Inc.; The
Home Insurance Company and Phoenix Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

ORDER

The motion of Converse Trucking Service and Donald H. Noteboom for new trial came on regularly to be heard before the undersigned Judge of the above-entitled Court on the 15th day of April, 1957. The said Converse Trucking Service and Donald H. Noteboom appeared by Duane Vergeer of their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin of its attorneys. The Court having heard arguments of counsel and being fully advised:

Now Orders that the motion for new trial be, and it is hereby denied.

Dated, this 15th day of April, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the District of Oregon; Pacific Intermountain Express Co., Defendant and Third Party Plaintiff; and John Gordon Gearin, Its Attorney, Greetings:

You and each of you will please take notice that Converse Trucking Service, a corporation, Plain-

tiff, and Donald H. Noteboom, Third Party Defendant and Counter-Claimant, do hereby give notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of Pacific Intermountain Express Co. and against Converse Trucking Service and Donald H. Noteboom.

Dated this 14th day of May, 1957.

VERGEER & SAMUELS,

By /s/ DUANE VERGEER,
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pretrial order; Special interrogatories; Judgment order; Motion for new trial; Order denying motion for a new trial; Notice of appeal; Bond for costs on appeal; Statement of points; Designation of contents of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries,

constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8508, in which Converse Trucking Service, a corporation is plaintiff and appellant; Donald H. Noteboom is Third-party defendant, Counter-claimant and appellant and Pacific Intermountain Express Co. is the defendant and third-party plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Exhibits 3-A through F; 10-A through G and 23. The reporter's transcript of proceedings will be forwarded as soon as it is filed in this office.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 18th day of June, 1957.

[Seal]

R. DeMOTT,
Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15603. United States Court of Appeals for the Ninth Circuit. Converse Trucking Service, a Corporation and Donald H. Noteboom, Appellants, vs. Pacific Intermountain Express Co., a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: June 19, 1957.

Docketed: June 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 15603

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff-Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,

Defendant and Third
Party Plaintiff-Appellee,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant-
Appellant.

APPELLANTS' STATEMENT OF POINTS

Come Now, Converse Trucking Service, a corporation, and Donald H. Noteboom, the Appellants herein, and present the following as a Statement of Points upon which they intend to rely in their several appeals of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the several judgments.

Dated this 24th day of June, 1957.

VERGEER & SAMUELS,

By /s/ C. S. CROOKHAM,

Of Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1957.

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Nos. 15603-15604

United States
Court of Appeals
For the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corporation and
DONALD H. NOTEBOOM,

Appellants,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

SAMACK, INC., a Corporation,

Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 23 to 190)

FILED

MAR 20 1957

PAUL F. BERRY, JR., CLERK

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District of Oregon

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Appeal from the United States District Court for the
District of Oregon

In the United States District Court
for the District of Oregon
Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

vs.

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,

Defendant.

Wednesday, March 20, 1957

Before: The Honorable Gus J. Solomon, Judge of
the above-entitled court and a jury.

Appearances:

MESSRS. DUANE VERGEER, and
CHARLES CROOKHAM,

Attorneys for Converse Trucking Service
and Donald H. Noteboom;

MR. JOHN GORDON GEARIN,

Attorney for Pacific Intermountain Ex-
press Co.; and

MR. ROBERT CLAPPERTON,

Attorney for The Home Insurance Com-
pany.

PROCEEDINGS

The Court: All right, go ahead.

Mr. Vergeer: Your Honor, we will call Mr. Noteboom.

∴ DONALD H. NOTEBOOM

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your full name, Mr. Noteboom? A. Donald H. Noteboom.

Q. And how old are you? A. Thirty-six.

Q. By whom are you employed?

A. Converse Trucking Service.

Q. And what is the nature of your employment?

(Testimony of Donald H. Noteboom.)

A. Line driver, truck driver, whatever you want to call it.

Q. Well, line driver, you say, what is the difference between a truck driver and a line driver?

A. Well, it's all the same actually.

Q. Well, what sort of traveling do you do with a truck?

A. Well, at the time of the accident I was driving from Portland to Klamath Falls.

Q. What sort of a run do you have now?

A. I am running to Grants Pass from Portland.

Q. How long have you been driving a truck before this [2*] accident occurred? A. 1941.

Q. Have you been more or less continuously employed as a truck driver since 1941?

A. Yes, I was self-employed from 1946 to '47, but almost the spring of '48, and then I have been employed by other trucking companies.

Q. About how many miles would you drive, normally, in the course of a month?

A. Oh, approximately 7,000 miles a month.

Q. About 7,000 miles a month, and at the time of this accident, by whom were you employed?

A. Converse Trucking Service.

Q. Now, what sort of a rig were you driving?

A. An International cab over.

Q. Can you describe that any further?

A. Well, it's a tractor that pulls a set of doubles. In other words, two trailers and——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Donald H. Noteboom.)

Q. And that tractor, how many front wheels does it have? A. Two wheels.

Q. Two front wheels, how many rear wheels?

A. It had two. It's just a single axle.

Q. Just a single axle? A. Single drive.

Q. All right. And it has how many tires on the rear axle? [3] A. Four.

Q. Then the box you were pulling, what sort of wheels did it have, the first box?

A. The same as a tractor. It has four wheels on the first trailer, then there is the dolly and it has four wheels and then the end trailer has four wheels on it.

Q. You mean the second box?

A. Second box, yes.

Q. So each box actually has a single axle with four tires on it that are an integral part of the box?

A. Yes.

Q. And the forward part of the first trailer rests on the tractor; is that right? A. Yes, sir.

Q. And the forward end of the second trailer rests on a dolly? A. Yes.

Q. And that consists of a single axle with how many tires on each side?

A. Nine on each side.

Q. Well, for the whole rig, you mean?

A. Yes.

Q. Nine tires on each side for the whole rig?

A. Yes.

Q. All right. Were you familiar with this particular piece [4] of equipment?

(Testimony of Donald H. Noteboom.)

A. Yes, very familiar.

Q. How long had you been driving it?

A. Oh, I drove—I drove this particular rig for almost two years.

Q. That's before the accident, of course?

A. Yes.

Q. What sort of a power plant did it have?

A. 200 Cummins.

Q. That's a diesel? A. Yes.

Q. And 200 horsepower? A. Yes.

Q. About what time did you leave Portland before the accident?

A. Approximately five o'clock.

Q. About what time did the accident occur?

A. The accident?

Q. Yes. A. One-thirty.

Q. Is that A.M.? A. Yes.

Q. And you left Portland at five o'clock p.m.?

A. Yes.

Q. Did you make any stops?

A. Albany, Oakridge. [5]

Q. And did you make any stops there for the purpose of discharging any cargo? A. No.

Q. What was the purpose of those stops?

A. Albany I had coffee and in Oakridge I stopped and fueled and ate there.

Q. About how long did you stop in Albany?

A. Oh, at Albany about fifteen, maybe twenty minutes.

Q. And how about Oakridge?

A. I was there about an hour.

(Testimony of Donald H. Noteboom.)

Q. Now, as you traveled up the highway from Oakridge, what was the nature of the weather?

A. The weather was nice, it wasn't snowing or anything. It was cold.

Q. What condition—what was the condition of your equipment?

A. The equipment was in very good condition.

Q. You say it was cold, but the weather was clear; is that right? A. Yes, it was clear.

Q. Was there any snow on the road?

A. Yes.

Q. Was there any banks of snow alongside?

A. After you got higher up, yes.

Q. Well, when you approached the top of the grade there, how was the snow? [6]

A. Lots of snow.

Q. About how deep was it along the sides?

A. Oh, I'd—it was almost even with the top of the cab at the top of the hill.

Q. Almost even with the top of the cab?

A. Yes, at the top of the hill.

Q. All right. Now, how far past the top of the hill did this accident occur, approximately?

A. I'd just say five miles.

Q. And have you come down a very appreciable amount in altitude from the top of the hill to where the accident happened? A. Yes.

Q. Now, at the scene of the accident, is there any grade on the road?

A. There is just a slight downgrade, not enough that you even hardly notice it.

(Testimony of Donald H. Noteboom.)

Q. Did the snow blow at all; was it dry enough so that there was dust behind your truck?

A. Yes.

Q. Snow dust? A. (Witness nods head.)

Q. Now, how far apart, or how far away from you was the other vehicle with which you later collided when you first saw it? [7]

A. Well, he topped the grade, oh, it was quite a ways back; just as I came over the little grade he came over a hill on the other side, and it was, I imagine about a mile and a half or two miles apart.

Q. Was there anything in between you and the other vehicle? A. Not a thing.

Q. About how wide is the road at the scene of the accident?

A. Well, it was wide enough for two vehicles I know.

Q. Did they need to be graded at all?

A. Well, it seemed to be—it had snowed up there the Sunday before real hard, because I had come over it then, but as far as the road, it was in pretty good condition right there. A lot of snow.

Q. Can you—well, strike that. All right. Now, as the vehicles approached each other, what part of the highway were you driving on?

A. I was on my right-hand side of the road.

Q. How close to the right-hand bank of snow were you driving?

A. I was almost touching the bank.

Q. As the other vehicle approached you, where was it with reference to the road?

(Testimony of Donald H. Noteboom.)

A. He was coming fine, coming along real fine.

Q. On his own side?

A. On his own side of the road. [8]

Q. About how fast do you think he was going?

A. Approximately thirty-five.

Q. And about how fast were you going?

A. About thirty-five miles also.

Q. Well, now, your lights were on, were they?

A. Yes.

Q. And the lights on the other truck were on also?

A. Yes.

Q. Where is the battery box on your truck?

A. The battery box is on the left-hand side just underneath the fender on my side.

Q. Outside the cab?

A. Outside the cab.

Q. I can't hear you. A. Outside the cab.

Q. You know, if the last juror over here doesn't hear you, you might as well not testify. We have to all hear you, and are your lights operated from your battery set?

A. Yes.

Q. Now, as the vehicles approached each other, as you have already testified, you were approaching each other and each was on his own side of the road. Was there any reason at that point—was there anything at that point visible to you that gave you any concern?

A. No, sir, none at all. [9]

Q. All right, then what happened?

A. Well, as I approached it, all of a sudden it seemed like he either got scared or his front hooked

(Testimony of Donald H. Noteboom.)

in some snow or something and into the snowbank he went on the right side and the next thing I knew, there was the back end of his tank right in my face.

Q. The back end of his truck?

A. The back end of his truck.

Q. And what happened then?

A. Well, the next thing I remember I seen steam coming up, and I was trying to get out of the truck.

Q. Where was your truck then?

A. Well, it was setting on the other side; I don't know just exactly the direction, but it had turned this way (indicating) and it was actually headed back the way I was coming.

Q. That's the next thing you recall?

A. That's the next thing I recall.

Q. At that time, were you conscious of anything about the truck that was different?

A. Well, yes, there was no windshield in it. It was kind of cold.

Q. Well, how about the door on your left?

A. It was all crumpled up.

Q. How about your steering wheel? Where was it? [10]

A. It was in my stomach.

Q. And how about your feet, were they free?

A. My left one was hooked in behind the clutch.

Q. Which foot? A. The left one.

Q. Your left foot, and were there any lights on at that time?

A. Well, I seen truck lights. About all I seen was a set of headlights.

Q. You saw a set of headlights?

(Testimony of Donald H. Noteboom.)

A. Yes, where I was sitting heading back the way I was coming, there was a set of headlights there.

Q. At that time, did you see the truck with which you had collided?

A. Yes, it was off to the left—off to the right, I mean, I was sitting there, but I didn't see much about it. I was too concerned with getting out of there.

Q. Well, what did you do; were you conscious of any pain at all?

A. Well, I seen steam coming up. That's the first thing I remember and then I heard somebody say, "My God, he is still in the truck."

Q. And what did you do?

A. Well, I proceeded to try, I guess, to try to get out of there. The right door was stuck. I couldn't get it open. [11]

Q. That was the right-hand door?

A. The right-hand door.

Q. You were able to extricate yourself from behind the wheel?

A. Yes, I moved it up off of me.

Q. You moved it up, did you?

A. Yes, I did.

Q. And then how did you get out of there?

A. Well, I kicked the door open. It seemed to be stuck, and I just hauled off and kicked it. I guess I was a little bit scared.

Q. You were scared?

(Testimony of Donald H. Noteboom.)

A. I thought the thing was on fire and here it was steaming.

Q. And did anyone help you get out of the truck?

A. Well, I just—as I was going out the door there was a man come up to the snowbank on the right-hand side there, but I don't know who it was or anything like that.

Q. Then what happened to you?

A. Well, then they put me in a P.I.E. rig that had come from behind me and they put me in the cab to keep me warm.

Q. What side of the cab do you drive that truck from?

A. The left side.

Q. And is that a cab over the motor?

A. Yes.

Q. And that's where you were sitting at the time of the [12] accident, I suppose?

A. Yes.

Q. Did you make any inspection of the truck or position of the vehicles on the highway at that time?

A. When I was sitting in this other truck?

Q. Well, at any time at the scene of the accident?

A. Well, at the scene, but—yes, I was at the scene of the accident, but I was sitting on this other truck trying to keep warm, and I, well, more or less looked the situation over then.

Q. It was out in front of you, is that it?

A. That's right.

Q. Were the headlights on this truck that you

(Testimony of Donald H. Noteboom.)

were sitting in turned on? A. Yes.

Q. And you say that was a P.I.E. truck?

A. Yes.

Q. Do you know what the markings on that truck were?

The Court: Which one are you talking about?

Q. (By Mr. Vergeer): The truck he was sitting in, your Honor. He was sitting in this truck to keep warm after the accident.

A. The markings on it?

Q. Yes, do you have any idea what it said on the side of that truck you were sitting in? [13]

A. Well, yes, it was a conventional—I don't know whether it was a K.W. or Peterbilt. No, it was a K.W. I am sure.

Q. Well, that's all right. Just skip it. Did you see the truck then with which you had collided?

A. Yes.

Q. What kind of a truck was that?

A. That was a Kenworth, cab over.

Q. Did it have any markings on it?

A. Yes, you mean—

Q. Pacific Intermountain?

A. Yes, Pacific Intermountain Express. Just at that time they were changing over, some of them was West Coast and some of them was P.I.E.

Q. Now, were you at that time, when you were sitting in this truck, conscious of any injuries at all?

A. You mean in the cab where I was getting warm?

(Testimony of Donald H. Noteboom.)

Q. Yes.

A. Well, that's where I found my knee was all banged up.

Q. Were you conscious of any injuries to your head at that time?

A. Well, a little bit woozy is all.

Q. And you found your knee was injured?

A. Well, my hand, that's the original thing I really noticed, but I found out afterward I was sitting in the cab [14] there and my knee was hurting because I couldn't move the darn thing very good.

Q. And what was wrong with your hand?

A. It was bleeding, had blood all over it.

Q. That's what you could tell about it?

A. That's all I could tell. It had been chewed up a little bit.

Q. And anything else about you that you noticed wrong with you at that time?

A. Well, my stomach was hurt.

Q. How did you leave the scene of the accident?

A. In an ambulance.

Q. About how long after the accident was that?

A. It was quite awhile. I'd judge an hour and a half. I don't know just exactly how long it was.

Q. And from there where did you go?

A. Went down to Oakridge and they stopped there and took me in and was going to treat me with first aid, more or less, and they put blankets all around me trying to get me warm, and from there on they took me into Eugene to the hospital.

Q. Who took care of you at Eugene?

(Testimony of Donald H. Noteboom.)

A. Dr. Teller.

Q. And how long did you stay at the hospital; first of all, what time did you arrive there, about?

A. At the hospital?

Q. Yes. A. Approximately five a.m.

Q. And when did you leave the hospital?

A. The next day.

Q. At about what time?

A. About eleven o'clock in the morning, somewhere around there, eleven—I don't remember just exactly how long.

Q. Well, the day after you—the day after you arrived there anyway? A. Yes, it was.

Q. What was done for you there?

A. Oh, X-rays, sewed me up.

Q. Sewed you up, what did they sew up?

A. My knee, that's—and my hand, out there they didn't sew it. They just laid it all back together and bandaged it up.

Q. How about your head; was anything done for that?

A. No, they took an X-ray, I guess, and that's all they did.

Q. And were you given an anesthetic for sewing your knee up? A. Yes.

Q. A general anesthetic or local?

A. General. [16]

Q. Took you to surgery; is that it?

A. Yes.

Q. When you left the hospital, what sort of condition were you in?

A. Oh, pretty good, except my knee was all.

(Testimony of Donald H. Noteboom.)

They had to put a kind of a cast on it, so I couldn't use it.

Q. Sort of a splint?

A. Well, it wasn't a splint. It was a cast.

Q. It was a cast?

A. Plaster and that plaster stuff, whatever it is.

Q. How long, from where to where did that cast extend?

A. Well, from here (indicating) up to here (indicating).

Q. And how long did you wear that plaster cast?

A. Almost two weeks.

Q. Who took it off? A. Pardon.

Q. Who took it off?

A. He did, Dr. Teller.

Q. In Eugene? A. In Eugene.

Q. When you left the hospital, where did you go? A. I came home, here in Portland.

Q. And then did you see the doctor again?

A. Yes, I drove back down to Eugene to see him.

Q. You drove down? [17] A. Yes.

Q. With your stiff leg?

A. Yes, with one leg.

Q. And about how long after the accident was that when you went back down there?

A. That was about, I think it was eight days after the accident.

Q. How many?

A. Eight days after the accident, or after I left the hospital.

(Testimony of Donald H. Noteboom.)

Q. At that time, he didn't take the cast off?

A. No, he took it off and put another—oh—what do you call it—wrapped it all up this time. It was all underneath here (indicating), and it held it so the knee would be opened to heal better.

Q. Your knee would be open to the air?

A. More or less, yes.

Q. And then did you go back to Portland?

A. Yes.

Q. And how long was it before you went down again?

A. The 20th, or 19th, because then I drove on down to Coos Bay.

Q. I beg your pardon?

A. It was the 19th or 20th.

Q. You will have to speak up. It's very hard to hear you back here. You went back down again, did you? [18]

A. The 19th or 20th, yes.

Q. Did you drive down? A. Yes.

Q. And what did the doctor do for you that time? A. He took the bandage off then.

Q. And left it off? A. Yes.

Q. How was your knee at that time?

A. Well, it was pretty sore.

Q. Were you able to bend it?

A. Yes. I could bend it a little bit, not very much, but it would pull in there if I done it too much.

Q. How was your elbow at that time?

A. Well, it was all right except there was—I just didn't want to bump it.

(Testimony of Donald H. Noteboom.)

Q. And any other injuries?

A. Oh, my hand.

Q. How was your hand by that time?

A. It was healing pretty good.

Q. How about your stomach?

A. A little bit sore. I was kind of black-and-blue.

Q. Now, Mr. Noteboom, when did you go back to work?

A. It was the 30th or 31st. I don't remember just how long it was.

Q. Well, how long were you off work as a result of this [19] accident?

A. It was approximately—well, I know I missed ten trips.

Q. Ten trips? A. Yes.

Q. Are you paid by the trip?

A. No, sir, more or less divisions. We get a division in running to Klamath Falls and a division running back. That's one trip, and I missed ten of those.

Q. Well, are you paid by divisions?

A. Yes.

Q. All right, for each trip then one way, you are paid? A. Yes.

Q. So you missed twenty divisions; is that it?

A. Yes.

Q. And how much are you paid?

A. Well, here we go again. It's a division and a half from Portland to Klamath Falls, less what we call—or actually it's just a straight run and they pay \$27.60.

(Testimony of Donald H. Noteboom.)

Q. Well, how much income did you lose by reason of your inability to work? I think that's what we'd better ask you.

A. Well, it was approximately about \$540.

Q. \$540? A. Yes.

Q. All right. You didn't quite lose a month's work? [20] A. Not quite.

Q. About four weeks actually?

A. No, it was just a couple of days less than four weeks.

Q. But figuring the trips that you lost, you lost \$540 in wages? A. Yes.

Q. How have you been getting along, Mr. Noteboom, since the accident from the point of view of the injuries that you sustained there?

A. Well, I can't get down on my knees or bump my knee at any time. It's sore. It will probably get over it. I don't know, and by golly I have had headaches.

Q. You have had headaches? A. Yes.

Q. And did you ever have headaches before the accident?

A. I had a sinus headache maybe once in awhile, not those sharp pains going to my head.

Q. What kind of headaches do you get now?

A. I got a sharp pain in there, and it might be there for five minutes and it will go away and my head will hurt a little bit, but I don't know what kind of headaches you'd call them.

Q. Well, can you indicate the pain, where it is in your head?

(Testimony of Donald H. Noteboom.)

A. Right along this side here (indicating) and along the top of my head. [21]

Q. So your right side you are indicating?

A. That's right, right side.

Q. Does that interfere with your work?

A. No, I haven't let it.

Q. Do you take anything for it?

A. No, I went down and got glasses to see if that would help, but it didn't help.

Q. Did you wear glasses before? A. No.

Q. Do you wear glasses now?

A. No, my eyes are all right.

Q. Again, I will have to remind you to speak up.

A. I am sorry.

Q. Are those headaches improving any?

A. Yes, they seem to be.

Q. How often do you have them?

A. Oh, you never know. I might get one in ten minutes from now, and it might go for a couple of days and not even have any kind of a pain.

Q. But you have one at least every couple of days? A. I have had one every couple days.

Q. How about the bruise on the back of your head; did that disappear?

A. Yes, it disappeared.

Q. Is that perfectly all right now? [22]

A. Yes, it's a little bit sore right on top. There is a dip in there or something, whatever you call it.

Q. Going back to the scene of the accident, Mr. Noteboom, what side of the road were you on when the collision occurred?

(Testimony of Donald H. Noteboom.)

A. I was on the right side of the road.

Q. And the cabs passed each other without any trouble, didn't they? A. Pardon me?

Q. The cabs of the two trucks passed each other without any trouble?

A. Well, I wouldn't say that.

Q. Well, there was no collision between the front end of your truck and the front end of the tanker?

A. Well, he was off in the snowbank.

Q. Yes, that's right.

A. But my cab wasn't in very good condition.

Q. No, your cab was wrecked. I understand that. Well, just a minute——

A. Well, you said the two cabs.

Q. No, no, what I had reference to was the two cabs passed each other before the impact without interference; is that right? A. Yes.

Q. And then your cab was smashed by the rear end of the tanker that it collided with? [23]

A. (Witness nods head.)

Mr. Vergeer: Now, I wish the bailiff would, your Honor, hand the pictures of the cab and the tractor to the witness, please?

Mr. Gearin: You mean our pictures, counsel?

Mr. Vergeer: Well, our pictures.

Mr. Gearin: I haven't seen those yet. If those are the same, I have no objection to any of the photographs being received in evidence if they are the ones that counsel has showed me.

Mr. Crookham: There are two series there.

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: I think they are on the table. Will you hand these exhibits to the witness, please?

(Photographs handed to witness.)

Q. (By Mr. Vergeer). You are now being handed exhibits marked Nos. 3-A through G and Exhibits Nos. 10-A through F, except C. Will you take each separate picture and read the exhibit number on the back of it and tell the jury then what that picture shows?

A. This is Converse Exhibit 3-A. You don't want the number?

Q. Yes. A. 8508.

Q. No, just 3-A.

A. This is a picture of the P.I.E. tanker facing with [24] the P.I.E. panel sitting in the front of it.

Q. All right, that's taken at the scene of the accident? A. Yes.

Q. Does that show the damage to the tanker?

A. No, it doesn't show the tanker because the P.I.E. panel is sitting in front of it.

Q. It shows the front of the tanker?

Mr. Gearin: Will you explain to the jury that those photographs were taken the next morning?

Mr. Vergeer: The daylight pictures were taken the next morning, certainly, we will agree to that.

The Witness: This is Converse Exhibit 3-B; it's a picture of the Converse rig. It's laying over in the snowbank pretty much.

Q. (By Mr. Vergeer): Converse rig?

(Testimony of Donald H. Noteboom.)

A. Yes, the tractor and one trailer.

Q. That's the tractor you were driving?

A. Yes.

Q. All right.

A. This is Converse Exhibit 3-C. This is evidently a picture of the trailer, the last trailer.

Q. The last trailer?

A. Yes, sitting by itself here.

Q. Yes, part of your equipment there?

A. Yes. This is Converse Exhibit 3-E and it's a picture [25] of the P.I.E. tanker being hoisted with a wrecker.

Q. Does that show the damage to the tanker?

A. Yes, with the damage on the back of the tanker.

Q. Is that the way it looked?

A. Pardon me?

Q. Is that a fair representation of the way it looked at that time? A. Yes.

Q. All right.

A. Converse Exhibit 3-F, and it is the trailer that was hooked onto the tractor.

Q. That's the Converse trailer?

A. Yes, the first trailer.

Q. I see, and that's part of your equipment?

A. Yes.

Q. And does that show the damage to it?

A. Just the front part very slightly, not all of it.

Q. All right.

A. Are you sure that's one of them?

(Testimony of Donald H. Noteboom.)

Q. I don't know. You have it there. I haven't.

A. Converse Exhibit 3-D, there is no name—oh, yes, there is a name. It's a Converse trailer.

Q. If you can't recognize that picture, why, that's all right. You just say you can't.

A. I don't remember of any of the back of it being out. [26] This has the whole back end of the trailer out.

Q. Yes, that's a picture apparently taken at the scene of the accident? A. Yes.

Q. And that's the back of a Converse trailer there? A. Yes.

Q. All right.

A. Samac, Inc., Exhibit 10-F, it's a picture of the cab, and it was taken down here by Mr. Sadoff's shop.

Q. And is that a fair representation of the way the cab looked after the accident? A. Yes.

Q. Very well.

A. Samac, Inc., Exhibit 10-E, it's also a picture of the tractor and of the first trailer.

Q. Is that a fair representation of it?

A. Yes, sir. Samac, Inc., Exhibit 10-D, same thing, tractor and first trailer.

Q. Very well.

A. Samac, Inc., 10-B, it's just the cab close up. It's—the trailer is there. You can see the front part of it. Samac, Inc., Exhibit 10-G, and this is at the scene of the accident. It's also of the cab and the front end of the trailer.

Q. Right at the scene of the accident? [27]

(Testimony of Donald H. Noteboom.)

A. Yes, sir.

Q. All right, fine.

A. And this is the Samac, Inc., Exhibit 10-A, and it's a picture of the tractor.

Q. There was one picture there that was taken without any damage to it—that's the one—is that a fair representation of the way your leg looked before the accident? A. Yes.

Q. Very well, we will offer the pictures, your Honor.

Mr. Gearin: No objection, your Honor.

The Court: Admitted.

(Whereupon, photographs previously marked Converse Exhibit Nos 3-A through G and Samac, Inc., Exhibits Nos. 10-A through F, except C, were received into evidence.)

Mr. Vergeer: We would like the jury to have an opportunity to view those pictures, your Honor.

The Court: Go ahead with your witness.

Q. (By Mr. Vergeer): I have a couple of questions, your Honor. Do you have, by the way, can you show to the jury—do you have any scars as a result of this accident on your knee? A. Yes.

Q. I would ask permission, your Honor, to be permitted to show this to the jury, to show the extent of the injury.

The Court: All right. [28]

Q. (By Mr. Vergeer): Will you raise your trouser leg, please? Can you raise your knee any?

(Testimony of Donald H. Noteboom.)

And that was left by the cut across the knee; is that right? A. Yes.

Q. As a result of the accident?

A. (Witness nods head in the affirmative.)

Mr. Vergeer: You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Mr. Noteboom, when were you first contacted about filing your lawsuit against Pacific Intermountain Express?

Mr. Vergeer: I think that's irrelevant, your Honor.

The Court: Objection sustained.

Q. (By Mr. Gearin): Mr. Noteboom, you were going thirty-five miles an hour at the time you approached the scene of the accident? A. Yes.

Q. Could you be going as fast as forty-three miles an hour? A. No.

Q. All right. Did you have a tachograph or speedograph on your truck? A. No.

Q. Isn't it a fact that it is the policy of Converse Trucking Service not to have such a device on their trucks?

Mr. Vergeer: Just a moment, your Honor, I would object to that on the ground that it's entirely immaterial in the [29] first place, and in the second place, I think that it's improper for counsel to even ask the question, and he knows it's immaterial.

The Court: You mean—wasn't the question——

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: What the policy of Converse, I believe he said, what the policy of Converse was with reference——

Mr. Gearin: Not to have those on their rigs.

Mr. Vergeer: Not to have a tachograph on their rig. I can't see, your Honor, how it has anything to do with it whether there was one or not.

The Court: Objection sustained.

Q. (By Mr. Gearin): What is a tachograph, Mr. Noteboom?

A. Well, a tachograph is a revolution of the motor.

Q. And what is a speedograph?

A. It's the speed you are going.

Q. And will you agree with me that a speedograph in a motor vehicle will indicate, if working properly, the speed at which the motor vehicle is going at any given hour, the time of a stop and the length of the stop? A. Yes.

Q. All right. You saw the P.I.E rig approaching you approximately a mile away?

A. Approximately, yes.

Q. You were going downhill?

A. Slight grade. [30]

Q. You left Portland at about five o'clock in the afternoon and the accident happened about three o'clock the following morning?

A. One-thirty, as I recall.

Q. One-thirty. Now, there was no other vehicles in sight, as you recall, as you approached the scene

(Testimony of Donald H. Noteboom.)

of the accident, other than the vehicle which was approaching you and that was the P.I.E. tanker?

A. The P.I.E. tanker.

Q. When you were approximately 60 or 75 feet apart, the front end of the P.I.E. tanker nosed to its right and into the snowbank?

A. Yes, sir.

Q. And at that minute you looked up and the end of the tank was in your face?

A. Yes, sir.

Q. The road was narrow at that point?

A. Well, the State Highway had plowed it.

Q. Would you say that the road was narrow?

A. A little.

Q. Now, you were at the hospital just overnight at Eugene? A. Yes.

Q. All right. And the next morning your boss, Mr. Sadoff, came to get you?

A. Mr. Sadoff did, yes. [31]

Q. Mr. Sadoff, your boss, came to get you, did he not?

A. I worked for the Converse Trucking Service.

Q. Do you recall your deposition taken in the office of your attorney on October 30th of last year?

The Court: Well, what is the dispute here now?

Mr. Vergeer: The question of whether Mr. Sadoff is his boss or not, your Honor.

The Witness: I have called him boss for years.

Q. (By Mr. Gearin): When we took your deposition, you referred to Mr. Sadoff as your boss?

A. Well, I said "boss." yes.

(Testimony of Donald H. Noteboom.)

Q. Now, you have been working steady since the accident? A. Yes.

Q. You have missed no time?

A. Just the time after the accident there.

Q. All right. And you haven't had any treatment for your headaches, I take it?

A. I went and got glasses, that didn't help.

Q. Well, you don't wear them?

A. They don't help.

Q. Now, your attorneys sent you to see Dr. Davis? A. Yes.

Q. He didn't treat you?

A. He examined me.

Q. All right. Now, as you approached the scene of the [32] accident, there was snow on the highway in front of you? A. Yes, sir.

Q. And there was snow on both sides?

A. Yes.

Q. And so would you agree with me that it was difficult for you to determine where the center of the main traveled portion of the highway was as you approached the accident's scene?

A. You're talking about a yellow line——

Q. I am talking about the center of the main traveled portion?

A. Yes, down there on the side of the road——

Q. As you approached the scene of the accident, will you tell us whether or not it was difficult for you to ascertain where the center of the main traveled portion of the highway was?

A. No, sir.

(Testimony of Donald H. Noteboom.)

Mr. Gearin: All right. I have no further questions.

Redirect Examination

By Mr. Vergeer:

Q. Mr. Sadoff—pardon me. Mr. Noteboom, I think you have testified by whom you were employed at that time?

A. Yes, Converse Trucking Service.

Q. Yes, were you employed at that time by Mr. Sadoff?

A. No, I drive his tractor, all Converse Trucking Service [33] does the hiring and firing and I work for them.

Q. And they pay you? A. Yes.

Q. And you do as they tell you? A. Yes.

Q. This was all at the time of the accident?

A. Pardon me?

Q. All I am asking you is at the time of the accident that's where we are talking about?

A. Yes.

Q. And you are still working for Converse Trucking Company, aren't you? A. Yes.

Q. Are you driving one of Mr. Sadoff's tractors?

A. Yes.

Q. You are, and do they tell you what to drive?

A. Yes, sir.

Q. That is, I am referring to Converse, tell you what to drive? A. Yes, sir.

Q. And where to go? A. Yes.

Q. And that was so at that time?

(Testimony of Donald H. Noteboom.)

A. Yes, sir.

Mr. Vergeer: That's all. [34]

Recross-Examination

By Mr. Gearin:

Q. One more question. You were hired by Mr. Sadoff, were you not?

A. I was hired by the Converse Trucking Service.

Q. When you first started driving Mr. Sadoff's trucks the first time, you were hired by Mr. Sadoff; weren't you?

A. Yes, it was before—oh, this was a long time ago.

Q. Would the answer to my question be that you were hired by Mr. Sadoff to drive that rig with the name Converse on it?

A. Now, wait a minute, I am confused here. I think that's a double question.

Q. All right, I will ask it again. Were you hired by Mr. Sadoff?

A. The first time I went to work for Converse, yes, sir, but then I left there and was gone away from there over a year and then I came back to work again.

Mr. Gearin: That's all the questions I have.

The Witness: And I worked for Converse.

Mr. Gearin: And that was before this accident?

The Witness: Oh, yes, way before.

Mr. Vergeer: That's all.

(Testimony of Donald H. Noteboom.)

Mr. Gearin: May I make an offer of proof in the absence of the jury, your Honor.

The Court: Ladies and gentlemen, you are now excused [35] until a quarter of two. Will you please return at that time. Everyone remain seated until the jury has left.

(Whereupon, the jury was excused.)

(Whereupon, the following proceedings were had in open court out of the presence of the jury:)

The Court: Go ahead.

Mr. Gearin: Mr. Noteboom, when were you first contacted about filing a lawsuit against Pacific Intermountain Express?

Mr. Vergeer: I object—

The Court: He is making an offer of proof.

Mr. Vergeer: I would like to know what counsel wants to prove.

The Court: I don't understand it myself.

Mr. Gearin: Do you want me to say it before the witness answers, your Honor?

The Court: Sure, I don't care.

Mr. Gearin: I'd rather have the witness do it. All right, did they tell you that you ought to file a lawsuit against Pacific Intermountain Express?

The Witness: Well, in a way, and in a way not.

The Court: All right.

The Witness: I have got a mind of my own.

Mr. Gearin: The purpose of this, your Honor, is that the complaint was filed within, I think, twenty-

four or [36] forty-eight hours after the accident, before the participants of the accident ever contacted Converse Trucking Service, and it will be our position, and I think the proof of the fact is that it was filed for the purpose of adding to the case here.

Mr. Clapperton: May I say, that the initial record was filed by Converse and then Mr. Gearin brought Mr. Noteboom in as a third party defendant in this case.

Mr. Gearin: That's correct because I knew he was going to file.

The Court: Well, how long after the accident did you file a case?

Mr. Gearin: It was some considerable period of time after we filed a counterclaim, your Honor, and then at that time we brought in Mr. Noteboom and there was also a suit filed by him in which he took a voluntary nonsuit.

The Court: You mean there was a case filed within a short time, all sorts of cases are filed——

Mr. Gearin: No, the Converse case was filed in court, your Honor, a day or so after the accident and then Mr. Noteboom filed and we filed a cross-complaint or counterclaim. We wanted to bring him in, and he filed a case and that's the reason I am going into this now, is that he was asked to file this case just to put the pressure on us.

The Court: Well, I want to say in my view it is [37] absolutely immaterial.

Mr. Gearin: Very well, sir.

The Court: And I think likewise the amount of the request for damages is likewise immaterial. If

you expect to get any comfort about that, I am going to comment on the testimony. You bring up the amount of damages and then you want to comment on the size when you are very well acquainted with our rules which do not permit a person to comment upon that.

Mr. Gearin: I brought it up, and I inquired first of your Honor, you know.

The Court: Yes, I know that.

Mr. Gearin: Because of the——

The Court: You know the rules here, that if he should get \$40,000 I would permit him to amend the complaint to make it conform with the proof. All right, recess until a quarter to two.

(Whereupon, a short recess was taken.)

The Court: Call your next witness.

Mr. Gearin: Officer Hazelwood, please. Mr. Crookham, will you get him? He is right outside the door.

The Court: Call your next witness.

Mr. Vergeer: I called Officer Hazelwood.

The Court: Call another witness then.

Mr. Vergeer: All right. He was my next witness. That's Officer Taylor. Do you want to take the stand then, Officer Taylor? [38]

HAROLD L. TAYLOR

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Taylor, what is your business, sir?

A. I am an Oregon State policeman.

Q. And how long have you been engaged in that business? A. Three years, six months.

Q. And were you engaged in that occupation last March; that is in 1956? A. Yes, sir.

Q. And what was your detail at that time?

A. I was on patrol from Oakridge east on Highway 58 to Crescent Lake Junction.

Q. All right. From Oakridge east, do you mean from Oakridge toward Klamath Falls?

A. Yes, sir.

Q. And your patrol would take you up to the Crescent Junction and then you would go back; is that it? A. Yes, sir.

Q. How long had you been patrolling that area?

A. Three years and about two months.

Q. I take it then that you are familiar with that road both in summer and winter? [39]

A. Yes, sir.

Q. In the course of that time, have you had occasion to investigate any accidents that happened on that road? A. Yes, several.

Q. And you're experienced and trained in the investigation of accidents, are you?

(Testimony of Harold L. Taylor.)

A. Yes, sir.

Q. Now, Mr. Taylor, did you have occasion to investigate an accident involving a Converse truck and train, I might say, and a Pacific Intermountain Express tanker and trailer?

A. I assisted on the investigation.

Q. And that was at what time; I mean, what date? Do you recall whether that was March 7th, last year?

A. Yes, sir.

Q. About what time did you reach the scene of the accident?

A. Two-twenty a.m.

Q. And when you arrived, what did you find there?

A. I found—you mean with relation to the accident?

Q. Yes.

A. Yes. A Converse set of doubles and a Pacific Intermountain Express had collided with one another. The tractor of the Converse set of doubles which was going—apparently was going east—had come back around and forming a—well, you might say a “U” shape with the first trailer blocking the highway. The third trailer which was the front of—[40] which was close to the berm or the side of the snow and the rear right side of it was out into the traveled portion of the highway.

Mr. Vergeer: I wonder, your Honor, if we might use the blackboard?

The Court: Go ahead.

Q. (By Mr. Vergeer): We will erase the diagram that's on it. Will you step down here, please.

(Testimony of Harold L. Taylor.)

Officer Taylor? I will hand you a piece of chalk. First, I will ask, is the road straight?

A. Yes, sir.

Q. My lines probably aren't straight, but they are as close as I can practicably draw them. Now, again, how would you like to have this; Klamath Falls at the top or the bottom?

A. It doesn't make any difference.

Q. And Eugene this way (indicating)?

A. Yes, sir.

Q. I will hand you the piece of chalk. First of all, at that time, did you see the pavement?

A. No, sir.

Q. There was snow, was there?

A. Yes, packed snow.

Q. Was the road—did it have a hard traveling surface on it? [41]

A. Yes, it was packed hard.

Q. Was there any snowbanks?

A. Yes, sir.

Q. And about how far apart were the snowbanks?

A. As I recall from a diagram, I think it was 23 feet, 8 inches.

Q. Between the snowbanks? A. Yes, sir.

Q. Is that about what you recollect them being from your personal recollection? A. Yes, sir.

Q. All right. Do you want to put that on there somewhere? All right. Can you tell us how wide either of the two trucks were? A. No, sir.

(Testimony of Harold L. Taylor.)

Q. Are you familiar with the width of a truck of that kind?

A. Yes, somewhat, it's roughly 80 inches or maybe more. I don't recall exactly how wide the truck is.

Q. Eight feet is the limit—

Mr. Gearin: We will stipulate that they were both 8 feet wide.

Q. (By Mr. Vergeer): They are both 8 feet wide, yes. Now, will you draw a line there—I have drawn two lines over on the blackboard and with those I intend to indicate the edge of the road, that is, the snowbanks on either side [42] and you have written on there, now, the distance of 23 feet, 8 inches. Will you now draw, to the best of your recollection, the position of the Converse rig when you arrived there? A. Yes, sir.

Q. I would urge you to try to draw them about in proportion, if you can, the general size.

A. Yes, sir.

Q. All right. Now, will you mark those No. 1, 2 and 3? A. That is front to rear.

Q. Well, if you wish. Now, am I right in saying that you have drawn a figure marked No. 1 with a pointed end on it, which along it we have drawn the top of the highway toward Klamath Falls?

A. Yes, sir.

Q. And you have drawn No. 1 pointed toward Eugene, and on the left side of the highway as we look at it? A. Yes, sir.

(Testimony of Harold L. Taylor.)

Q. And No. 2 you have drawn as being right square across the road?

A. As I recall it, it was approximately that way.

Q. And No. 3, facing more or less toward Klamath Falls and toward No. 2?

A. Yes, sir.

Q. And on the right side of the road?

A. Yes, sir. [43]

Q. For Klamath Falls-bound traffic; is that right? A. Yes, sir.

Q. Now, what is No. 1?

A. No. 1 is the tractor or the power unit of the train.

Q. That is the Converse rig? A. Yes, sir.

Q. And No. 2?

A. Would be the first trailer immediately behind the power unit.

Q. And No. 3?

A. Would be the second trailer back from the power unit.

Q. What, if any damage—or before we leave here, let's go on and put the other truck on, if you will? Where you found it?

A. Should I number this also?

Q. Yes, would you number that No. 1 and No. 2? All right. Now, you have drawn two figures, both of them facing in the general direction of Eugene, but anglewise with the rear end of each rig toward the center of the road and the front end toward the right-hand bank for Eugene traffic; is that right?

A. Yes, sir.

(Testimony of Harold L. Taylor.)

Q. And with respect to the position of No. 2 of the last drawing you have made, what was that?

A. This No. 2 is a tanker trailer. [44]

Q. I see, and No. 1? A. Is a tank truck.

Q. I see. What, if you know, is the over-all length, approximately, of that rig?

A. Oh, very nearly 60 feet.

Q. I see. About what was the distance between the two groups of vehicles?

A. From here to here (indicating), you mean?

Q. Yes, from the two groups of vehicles?

A. I couldn't say definitely as to the exact—it was 129 feet and some inches.

Mr. Gearin: Six inches, I believe.

The Witness: I am sorry. I don't have that. Sergeant Hazelwood has that in his notebook.

Q. (By Mr. Vergeer): But do you recall that that is substantially right? A. Yes, sir.

Q. Now, where was the damage to those vehicles?

A. Well, the only perceptible damage to the Pacific Intermountain Express was in this rear portion here (indicating) to the tanker, upper top of the tank.

Q. You are pointing to the left rear of the tractor of the tank truck, that is?

A. Yes, sir.

Q. Yes. [45]

A. And this had two double axles and this axle here (indicating) had been jerked back. The hangers and all the mechanism underneath it had been apparently broken loose because this wheel (indicat-

(Testimony of Harold L. Taylor.)

ing) appeared to have dropped back away from the other due to damage. I didn't observe any other perceptible damage to the vehicle other than this corner (indicating).

Q. All on the left rear corner?

A. Yes, sir.

Q. Was there any damage to the trailer?

A. None that I recall, sir.

Q. How about the Converse rig; where was the damage on that?

A. As I recall, the majority of the damage was suffered by the tractor. It would be the left front and side of the tractor that received quite an extensive damage.

Q. Extensive damage?

A. Yes, sir, the cab was loose, as I recall, and this whole area (indicating) was dented in quite a bit here (indicating).

Q. How about the trailers; were either of those damaged that you recall? A. I don't recall.

Q. Do you want to resume the stand now? Could you determine an area of impact?

A. No, sir. [46]

Q. Would you let me put it this way: Did you find debris on the road apparently from the collision? A. Yes.

Mr. Gearin: Just a moment, your Honor, I'd object to the form of the question.

Mr. Vergeer: Very well, we'll restate it.

Mr. Gearin: I ask that the answer be stricken and the jury instructed to disregard it.

(Testimony of Harold L. Taylor.)

The Court: The jury is instructed to disregard both the question and the answer.

Q. (By Mr. Vergeer): Very well, your Honor. Now, did you find any debris on the road?

A. Yes, sir.

Q. And what was the nature of that debris?

A. It was parts of the two vehicles involved in the accident.

Q. Any particular parts that you could identify?

A. Yes, sir, there was parts of a battery. There was parts of the glass from the headlight, and there was other pieces of metal which was on the highway, parts of the vehicle that had fallen off.

Q. About where were these parts of the vehicle with relation to the stopped, damaged vehicles?

A. It was between the two vehicles.

Q. I see. Between the two sets of vehicles? [47]

A. Yes, sir.

Q. Can you tell us whether it was any closer to one set than the other? A. No, I couldn't.

Q. Now, did Mr. Clancy—did you speak to a Mr. Clancy there? A. No, sir.

Q. Did you check to see whether the battery box on the Converse rig was intact? A. Yes, sir.

Q. And was it?

A. No, sir. It was ripped loose. The battery had been broken up.

Q. Did you, at that time, find the Converse driver anywhere? A. Yes.

Q. And where was he?

A. He was seated in another Pacific Intermoun-

(Testimony of Harold L. Taylor.)

tain Express truck which had pulled up just west of the scene of the accident. He was in the cab of that vehicle.

Q. Did you render any first aid to Mr. Noteboom? A. Yes, sir, I did.

Q. And what did you do for him?

A. I put a compress on his knee, a compress on his hand and I further checked him for signs of bleeding or serious cuts that needed immediate attention. [48]

Q. Now, did you check to see whether there were any tire marks leading to either of the stopped, damaged vehicles?

A. Yes. We observed tire marks leading to—from the west to the east to the trailer of the Converse set of doubles. There were tire marks which was—it was hard to determine if it was from the Pacific Intermountain Express, due to the fact that it apparently, when one of them had gone in and——

Mr. Gearin: Well, just a moment, your Honor, we'd object to what apparently was.

Q. (By Mr. Vergeer): Well, you couldn't identify them?

A. No, sir, there was none that we could identify positively from the Pacific Intermountain Express.

Q. All right. Now, will you describe to the jury the tire marks that led to the Converse trailer?

A. Yes. From the front of the Pacific Intermountain Express truck in which Mr. Noteboom was in——

(Testimony of Harold L. Taylor.)

Q. And that was parked some distance toward Eugene from the wrecked tanker; is that right?

A. Yes, it was west of the Pacific Intermountain Express truck. Well, the exact distance I don't know.

Q. Yes, all right, and you traced those tire marks, did you?

A. Yes, they were to the extreme right of the highway, very close to the berm or the built-up shoulder of the road by the snow and extended from the front of this truck to the [49] rear of the second trailer of the Converse.

Q. I see. Were they in a straight line, substantially?

A. No, sir, they were straight for a distance and then, as I recall, they angled to the left to where the truck set out into the highway.

Q. Now, will you step down and draw those marks on the board?

A. As I recall, this other truck was somewhere in this area (indicating). I don't know the exact spot of it.

Q. Very well.

A. The tracks extended from here (indicating) to here (indicating) and then slightly beared to the north in such a manner (indicating). There were—these here (indicating) were very faint and wasn't very perceptible and it became more perceptible in this general area here (indicating) which extended in a manner similar to that (indicating).

Q. Will you also mark on there, generally, the

(Testimony of Harold L. Taylor.)

place where the parts of the trucks were found or the debris?

A. It was in this area (indicating) mainly, and extended on over all of this full area over here (indicating). It was small pieces that extended out from both of the vehicles.

Q. Can you give us the distance of the—approximate, to the best of your recollection—the distance of the tire marks that led to the Converse rig were from its [50] right-hand snowbank?

A. No, sir, I couldn't. We didn't measure those because this truck here (indicating) had obliterated part of them, and it wouldn't have been an accurate measurement.

Q. I see, but beyond that truck and toward Klamath Falls from where that truck was, the right side track was clear; is that right? A. Sir?

Q. From where—we will mark that Truck No. 5 or something. Draw it in there so we will have something to refer to.

The Court: Can you write a "5" in that?

The Witness: Yes, sir.

Q. (By Mr. Vergeer): All right. Now, you have drawn a truck designated No. 5, and that is the truck you found Mr. Noteboom sitting in; is that correct? A. Yes, sir.

Q. And it was from that truck forward that you traced the tire marks to the Converse—the wrecked Converse rig? A. Yes, sir.

Q. And from there forward, how far were the

(Testimony of Harold L. Taylor.)

right-hand tire marks from the right-hand snow-bank?

A. These tire marks were from, extremely close, practically up against them. They extended right out to the extreme edge of this berm (indicating) of snow which is on this area (indicating). [51]

Q. I see. Okeh, I think you can resume the stand. Do you want to put the chalk down, first? You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Officer, did you make notes of your investigation? A. No, sir.

Q. All right. You remember, you have investigated Officer Hazelwood's notes to refresh your memory? A. Yes, sir.

Q. And I will ask you what significance is there that Officer Hazelwood's report didn't contain any mention of the marks to which you have just testified?

A. Because there was no measurements taken of it, sir.

Q. All right. As far as the measurements were concerned, Officer Hazelwood made the measurements?

A. He read the measurements. I held the lead end of the tape for him, yes, sir.
chains on the tractor, did it?

Q. All right. Now, the Converse rig had no

(Testimony of Harold L. Taylor.)

A. No, neither one of them had chains.

Q. The marks that you have indicated on the diagram here, Officer Taylor, led up to the rear unit of the three vehicle train of the Converse?

A. Yes, sir.

Q. Now, I was wondering if the clerk would hand to the [52] witness, please, the remaining photographs which have not been received in evidence bearing, I think, they're numbered 23-A to L. Officer, are those pictures of the scene of the accident as it existed when you got there?

A. Yes, sir, this first one shows it.

Q. Well, I think, officer, if I may interrupt you for a moment, will you look at all of them and then tell us if they are all pictures of the accident, and I may ask you about each one or any one in particular?

The Court: Were they taken immediately after the accident?

Mr. Gearin: Yes, sir.

The Court: About the time that he arrived?

Mr. Gearin: Well, I will ask the officer that. Were you there when the photographer was there?

The Witness: I was there when there were pictures being taken, sir.

Mr. Gearin: All right. Any objection to the introduction of these photographs?

Mr. Vergeer: Not if the officer could identify them. We don't know whether these are the pictures that were taken.

(Testimony of Harold L. Taylor.)

Mr. Gearin: Those are the only pictures of which I have any knowledge about being taken.

The Court: Have you seen those pictures?

Mr. Vergeer: I am not sure that I have, your Honor. [53] Counsel tells me that he has seen them, but I think that the officer should be permitted to identify them. He should have no trouble.

Q. (By Mr. Gearin): And there are two pictures, are there not, officer, of the daylight scene of the accident without the snow?

A. I didn't see them, sir—oh, yes, the scene; yes, there is two daylight pictures. However, I believe that of the Converse set here (indicating). These pictures were taken after the trailers had been moved, sir.

Q. I see. Well, those are the trailers that were involved? A. Yes, sir.

Mr. Gearin: May I approach the blackboard, your Honor?

The Court: Yes, go ahead.

Q. (By Mr. Gearin): Officer, there were lots of track marks around the scene when you arrived at what, two-twenty in the morning?

A. Two-twenty, yes, sir.

Q. Did you ascertain whether or not the tire marks that led up to the right rear of the third vehicle in the three train vehicle of Converse extended under the third unit? A. No, I didn't.

Q. Well, you mean they didn't or that you didn't see it?

A. I—we observed it. We checked it, sir, and it

(Testimony of Harold L. Taylor.)

did not extend beyond the rear wheel of the third unit. [54]

Mr. Gearin: We will offer the photographs in evidence, your Honor.

Mr. Vergeer: I think, your Honor, that the photographs of the scene are taken, at most, at different times. I don't know what the purpose is.

Mr. Gearin: Only for the purpose of illustration.

The Court: The snow is gone and so are the vehicles.

Mr. Vergeer: I would like to see them again if I may.

The Court: Show them to him. The pictures taken at the scene of the accident are admitted. The other two pictures we will wait for objection, if any.

Mr. Vergeer: Well, I take it that nothing is claimed for them by way of evidence in this case. They are simply illustrative of the scene.

Mr. Gearin: That's the sole purpose of them being offered.

Mr. Vergeer: Well, if that's the sole purpose, I have no objection to them being admitted.

The Court: All right. They are admitted for the limited purpose of just showing the area.

(Whereupon, Exhibits 23-A to 23-L, both inclusive, were admitted into evidence.)

The Court: Go ahead.

Mr. Gearin: I have no further questions, your Honor. [55]

(Testimony of Harold L. Taylor.)

Redirect Examination

By Mr. Vergeer:

Q. Officer, the vehicles as shown in these pictures, were they in the position on the pictures in which you first found them when you arrived?

A. On some of them I can't determine it, but the one that shows the clear view from approximately—it seems to be midway down east. It shows the vehicles. The train of vehicles have been moved and the highway appears to have been cleared when this picture was taken.

Q. Traffic had been re-established on the highway before the picture was taken; is that right?

A. I couldn't say that the traffic had been re-established, but I could say that this wasn't an accurate picture of the position these vehicles come to rest in, sir.

Q. What number picture, particularly, do you notice that in?

A. In No. 23-J, No. 23-D, No. 23-F and that's it. Well, this one (indicating)——

Q. May I ask you this, officer, were the vehicles moved while you were present? A. Yes.

Q. And about how long after you arrived?

A. Well, I couldn't say the exact time. It was quite some time after I arrived at the scene of the accident, but before the highway was cleared. I don't know the exact [56] time that the highway was cleared, sir.

(Testimony of Harold L. Taylor.)

Q. Now, can you tell me whether you had completed making your observations and taking your measurements before anything was moved?

A. Yes, sir, we won't allow it.

Q. And until the vehicles were moved, was it possible for any other vehicle to travel through there?

A. No, sir.

Mr. Vergeer: That's all.

Mr. Gearin: I have nothing further, your Honor.

The Court: That's all. Call your next witness.

Mr. Vergeer: Officer Hazelwood, please. [57]

WILLIAM HAZELWOOD

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your name for the jury, please?

A. William Hazelwood

Q. And what is your business, sir?

A. Law enforcement, State of Oregon.

Q. You are a State Police Officer?

A. That's right.

Q. How long have you been with the State Police?

A. Thirteen years—two and a half years.

Q. And during that time have you had occasion to investigate accidents?

A. Yes, sir.

(Testimony of William Hazelwood.)

Q. What was your particular assignment or duty during March of 1956?

A. I was on the highway.

Q. What highway was that?

A. I mean I was patrolling the highway.

Q. Patrolling what area of it?

A. In the Gilcrest area.

Q. Does that include the scene of this accident?

A. Yes. [58]

Q. And where were you stationed?

A. In Gilcrest.

Q. How far is that from the scene of this accident?

A. It seemed to be about twenty-seven miles, approximately.

Q. Can you tell us about how far it is from the scene of this accident to Portland?

A. I don't know.

The Court: Well, how far is it from Eugene?

Q. (By Mr. Vergeer): Yes, how far is it from Eugene?

A. It's a little over seventy miles.

Q. A little over seventy miles. All right. And it's about a hundred and twenty miles to Eugene, is it?

A. That's right.

Q. All right. Now, about what time did you arrive?

A. I believe it was two-twenty a.m.

Q. Did you arrive before or after Officer Taylor arrived?

A. I was there before Officer Taylor.

Q. And when you arrived, from which direction—you came from the Klamath Falls direction,

(Testimony of William Hazelwood.)

didn't you? A. That's correct, yes.

Q. And about how far is it from the junction to the scene of the accident?

A. Crescent Lake Junction?

Q. Crescent Lake Junction.

A. It's approximately 200 yards or just under 2/10th of a mile. [59]

Q. What is the grade of the road at the scene of the accident as to whether it was uphill or downhill, and, if so, in what direction?

A. It's very nearly level. It's a very slight downgrade towards the Klamath area.

Q. At the time you arrived, was there any snow on the ground? A. Yes, sir.

Q. What was the condition of that snow on the roadway?

A. It was packed, grated and hard packed.

Q. And how about the snow alongside of the road; about how high were the snowbanks on either side?

A. There was a 3½-foot snowbank on the south side, or the right side facing Klamath, and 4½ feet on the left.

Q. Facing Klamath, you are talking about?

A. Yes, facing Klamath.

Q. How far was it between the snowbanks?

A. Twenty-three feet, 8 inches.

Q. Now, when you arrived, what was the position of the two sets of vehicles?

A. Very similar to that diagram there (indicating).

(Testimony of William Hazelwood.)

Q. Is that substantially the position they were in? A. Yes.

Q. Was it possible for you to drive your car past the scene of the accident?

A. No, it was impossible to get back. [60]

Q. I take it then that from looking at the diagram that the Converse train completely blocked the highway? A. That's correct.

Q. Now, did you notice the position of the Pacific Intermountain truck? A. Yes.

Q. And what was its position with relation to the road?

A. Well, the front end was in the snowbank and the rear end was out on the road similar to that. The trailer tank was jackknifed and the front truck under the trailer was completely—in other words, the front angle was perpendicular with the rest of the trailer.

Q. Could you possibly take this model which is not a tanker truck but is a truck apparently loaded with wood and set it in the position that you found the truck in question? A. Yes.

Q. Let's just, for the purpose of this illustration, assume that this is the size of the road (indicating) and that would be—if this were the side of the——

A. The front end was in the snowbank.

Q. Now, where, if anywhere, was there damage to this tanker truck and trailer?

A. The rear end of the side of the oval-shaped tank was damaged and there was one more axle similar to this right here (indicating), and it was

(Testimony of William Hazelwood.)

pulled back slightly and the [61] undercarriage was damaged very badly.

Q. Was there any damage whatsoever to the trailer? A. No.

Q. Do you want to resume the stand?

(Whereupon, the witness resumed the stand.)

Q. (By Mr. Vergeer): Did you check the Converse train to see where the damage was on that?

A. I did and the tractor and just generally the trailers, but I didn't make notes on the damage to the trailers at all. I did on the tractor.

Q. All right. Where was the damage to the tractor? A. The left front end.

Q. And any damage to the left side of the tractor? A. Yes.

Q. How about the battery box and the equipment, electrical equipment along the left side of the tractor; was that intact or otherwise?

A. No, that was just practically exploded similar to an explosion all over the highway, particles of battery and pieces of metal and what not.

Q. And where was that debris located?

A. May I show you?

Q. Yes, you may step down.

A. In this general area in here (indicating), more of a throwing motion toward the Converse rig, right in this [62] general area (indicating).

Q. Generally in the middle of the road and all over that area? A. Yes.

(Testimony of William Hazelwood.)

Q. Were you able to find any tracks, any wheel tracks leading up to the Converse vehicle?

A. Yes, along the edge of the snowbank on this, on the right-hand side of the road (indicating).

Q. That is on the right side facing Klamath Falls?
A. Yes.

Q. And were those tracks clear?
A. Yes.

Q. And where did they lead?

A. They led up to the rear of the Converse.

Q. How far from the right snowbank were those tracks?

A. Well, it actually bit into the snowbank. As the snow went up to the bank, it bit into the edge of the snowbank and that's the way you could tell they were there. Otherwise, on the hardtack they wouldn't be there.

Q. I see, and you could trace those right to that trailer?
A. Yes.

Q. Now, from how far back did you trail those?

A. Back to this truck that was parked that the driver of the Converse truck was sitting in.

Q. That's to No. 5? [63]
A. No. 5.

Q. About how far would you estimate that was?

A. From 5 to 3?

Q. Yes.

A. I would say approximately 200 feet.

Q. All right. Do you want to resume the stand?
(Witness resumes stand.)

Q. (By Mr. Vergeer): Were there any marks that you could trace to the Pacific Intermountain truck?
A. Tire tracks?

(Testimony of William Hazelwood.)

Q. Yes. A. Yes.

Q. There were tracks? A. Yes.

Q. And I am sorry I didn't ask you awhile ago, then, where were they?

A. They were behind the tank trailer.

Q. And how far could you trace those?

A. Well, just right behind the trailer.

Q. Just right——

A. They didn't go any distance. They were right behind the trailer.

Q. Could you give any estimate of their lengths?

A. No, sir, I don't think so. They were obliterated out, and there was no effort made to measure them. [64]

Q. Where were they with relation to the right-hand bank traveling toward Eugene?

A. They were close, fairly close.

Q. Were you able to see any marks and connect them with the rear wheel of the tanker?

A. No, sir.

Q. Did you talk to Mr. Clancy? A. Yes.

Q. He was the driver, as I take it, of the Pacific Intermountain truck? A. That's correct.

Q. And did he tell you or point out to you any area of the impact?

Mr. Gearin: I object on the ground that Mr. Clancy is not a party, and it is part of the *res gestae*, and this man cannot make a definite statement on his part.

The Court: Objection sustained.

Mr. Vergeer: Your Honor, I would say that this

(Testimony of William Hazelwood.)

man was in the course of his employment in operating his truck and discussed what he had done with it.

The Court: Objection sustained.

Mr. Vergeer: Very well. Did you see a Mr. Burton at the scene of the accident?

The Witness: Yes.

Mr. Vergeer: I think that's all. [65]

Cross-Examination

By Mr. Gearin:

Q. Officer, you have referred to your notes in order to refresh your memory for the trial here?

A. Yes, sir.

Q. All right. I am going to ask you, officer, may I approach the blackboard, sir?

The Court: Yes.

Q. (By Mr. Gearin): If it is not a fact from the left front of the P.I.E. truck, it was 17 feet to the other side of the highway?

A. I'd have to look at my notes.

Q. If you will do that, please?

A. That's correct.

Q. All right. And at the rear left of our truck it was 11 feet, 7 inches to the other side of the highway?

A. That's correct.

Q. And at the front of the trailer was 22 feet, 7 inches to the other side of the highway?

A. It was measured, sir, from the left front wheel of that trailer which was under the truck.

Q. Right, and then from the left rear dual of the tanker trailer would be 14 feet, 9 inches to the side?

(Testimony of William Hazelwood.)

A. That's correct.

Q. And the distance from the rear of the trailer, the [66] tanker trailer to the third unit of the Converse rig was 129 feet, 6 inches? A. Correct.

Q. All right. Now, at that time, you obtained and signed your name to Mr. Clancy's tachograph card?

A. That's correct.

Mr. Gearin: I wonder if I might have that, and it be submitted to the witness, your Honor? There are two of them. I'd have to pick them out.

The Court: Do you want to make the officer your witness?

Mr. Gearin: Pardon me?

The Court: You are making the officer your witness?

Mr. Gearin: For this purpose.

The Court: All right. You ask him any question so that you don't have to put on any officer here, put on your full case, any question you want to ask him.

Mr. Gearin: Thank you. Is that the tachograph card, officer? A. Yes, that's it.

Q. All right. And that is Exhibit No. what?

A. Twenty-six-A.

Q. Now, officer, may I see your notes, please?

A. Yes.

Q. Officer, you did not establish the point of impact, did you? [67] A. No, sir.

Q. I note, officer, this following language, "Converse apparently got over for a meeting, something came back abruptly," and that's been crossed out?

(Testimony of William Hazelwood.)

A. Yes, sir.

Q. This says it was rather cold that night when you were out there; is that true?

A. That's true.

Q. What was the condition of the surface of the highway as far as being slippery?

A. It was very slick.

Q. Did that keep you busy most of the morning? I note from your notes, officer?

A. That's right.

Q. I didn't see any mention in your note with regard to the marks that led up to the rear of the Converse trailer, No. 3?

A. That's right.

Mr. Gearin: I have no further questions, thank you, officer.

Redirect Examination

By Mr. Vergeer:

Q. Officer, as long as—did you take measurements to the wheels of the Intermountain rig, that is, the Pacific Intermountain express? [68]

A. Yes.

Q. I'd like to put them on the board then. Can you see the board here; see what I am doing?

A. Yes, sir.

Q. All right. Can you give me the measurement from the rear of the Intermountain truck to the bank?

A. Eleven foot, 7.

Q. Eleven feet, 7 inches; is that correct?

A. That's correct.

(Testimony of William Hazelwood.)

Q. All right. Now, from the front?

A. Seventeen feet.

Q. And no inches? A. That's right.

Q. All right. Now, as I understand it, the wheels of the tractor from your illustration you measured the wheel of the trailer, the forward axle under his trailer? A. That's right.

Q. And did you then take it from the most forward wheel? A. No, the next one.

Q. The back one? A. Yes.

Q. From there to the other bank?

A. 22-7.

Q. 22-7 and then from the rear of that trailer did you take that from the wheels, too? [69]

A. Yes, 14-9.

Q. 14-9. Counsel asked you if you established a point of impact, and I believe you said "No." Did you have any evidence at all of the point of impact?

Mr. Gearin: Well, we'd object to that, your Honor. The officer said it was not established.

The Court: Well, he might be able to establish it. Go ahead and answer the question.

The Witness: It was impossible to establish the apparent point of impact other than in a large general area.

Q. (By Mr. Vergeer): All right. Was that general area, or where was that general area without trying to pinpoint it?

A. Between the two trucks.

Q. Well, was it closer to one or the other or in the middle?

(Testimony of William Hazelwood.)

A. I believe it was a little closer to the Converse where they ended up, the way they ended up.

Q. I see; a little closer to the Converse and in between the two?

A. The debris was a little closer to the Converse.

Mr. Vergeer: That's all. Thank you very much.

Recross-Examination

By Mr. Gearin:

Q. One thing more, officer, referring to your notes. This end (indicating), the right rear of the Converse Unit No. 3 was, as I understand it, 11 feet, 8 inches from the side of [70] the highway?

A. That's correct.

Mr. Gearin: Thank you, sir.

Redirect Examination

By Mr. Vergeer:

Q. Now, in going back from the rear of that truck, you say you traced a mark, a tire mark that you have described as having been right along the snowbank. Where did it leave the snowbank?

A. Where did it pull away from the snowbank?

Q. Yes, to go to the trailer?

A. Well, I couldn't say, other than in the general area of where the fresh snow was thrown out across the highway, in that general area. It left the snowbank and went towards it.

Q. How far back of the trailer was that about—your best recollection?

(Testimony of William Hazelwood.)

A. Oh, it wasn't very far. I would judge 30-40 feet.

Q. Thirty to 40 feet? A. About that.

Mr. Vergeer: All right, thank you.

The Court: Any further questions?

Mr. Gearin: Not from me, sir.

The Court: That's all. The officer is excused from further attendance to the trial. [71]

Mr. Vergeer: I would like to have the officer remain for at least a very short time, your Honor.

The Court: All right, next witness.

Mr. Vergeer: We will call Dr. Davis. [72]

DR. EDWARD W. DAVIS

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you tell the jury your name, doctor?

A. Edward W. Davis.

Q. And what is your business or profession?

Mr. Gearin: We will admit the doctor's qualifications, your Honor. I admit that he is specializing in the field of neurology or neurosurgery.

Q. (By Mr. Vergeer): Will you state your qualifications generally for the jury?

A. Yes, sir.

(Testimony of Dr. Edward W. Davis.)

The Court: Well, not in this court you won't. Once the qualifications are admitted, you don't. Ladies and gentlemen of the jury, it is admitted that Dr. Davis is a duly qualified and practicing physician and duly licensed here, and that he is specializing in the field of neurosurgery, and that he confines all of his activities to that. Now, doctor, will you tell us what the field of your surgery is?

The Witness: Primarily the surgical treatment of the brain, spinal cord, peripheral nerves, whether it be from injury or any disease that might be amenable to surgical treatment. [73]

Q. (By Mr. Vergeer): And in order to practice that specialty, doctor, do you have to diagnose those conditions? A. Yes, sir.

Q. Did you see Mr. Noteboom?

A. I did, yes.

Q. And when was that, sir?

A. May I refer to my notes?

Mr. Gearin: We object to that, your Honor, the doctor's report has not been given to me and it's not been marked as a pretrial exhibit. I anticipated that Mr. Crookham would supply me with it. I gave him a copy of my medical report.

Mr. Crookham: Your Honor, I am very sorry it was not sent to Mr. Gearin the other day. It was an oversight on my part that I did not have it marked yet.

The Court: All right, have it marked first. Doctor, did you write a letter to Mr. Crookham or Mr. Vergeer?

(Testimony of Dr. Edward W. Davis.)

The Witness: I did, yes, sir.

The Court: Do you have a copy of that letter?

The Witness: I have just the one copy, your Honor.

Mr. Vergeer: We have a copy that is the original, I believe.

The Court: Look at the original, do you have your office notes also?

The Witness: Yes, sir.

The Court: And was this letter taken from the office [74] notes?

The Witness: Yes, sir, I made notes and then actually I dictated it a short while after I made the examination.

The Court: All right, we will mark the original letter to Mr. Vergeer as an exhibit for identification and you can refer to that; if you want to question, you may refer to that one.

Mr. Vergeer: Very well, your Honor, thank you.

The Court: Give it to him.

Mr. Vergeer: That would be our Exhibit No. 20, I believe.

(Whereupon, letter referred to was marked Exhibit No. 20 for identification.)

The Court: It's only for identification.

Q. (By Mr. Vergeer): Yes. When did you examine Mr. Noteboom, doctor?

A. On January 10, 1957.

Q. And where was that examination made?

A. In my office in Portland.

(Testimony of Dr. Edward W. Davis.)

Q. And did you—what did you find upon making your examination, doctor?

A. Do you wish me to go into the history and all that I did at that time?

Q. Well, yes, whatever goes into your diagnosis.

Mr. Gearin: We'd object to that, if your Honor please, the plaintiff only went to this doctor and had this examination [75] only for the purpose of being called upon to testify.

The Court: The history of what; are you talking about the history of the accident?

Mr. Gearin: His history of his physical condition.

The Court: I am going to overrule you on that. The doctor, in order to make a diagnosis has to rely—did you have to rely on what he told you in order to make a diagnosis?

The Witness: Yes, sir, your Honor.

The Court: All right, you go ahead.

Q. (By Mr. Vergeer): Very well, doctor.

The Court: You have the privilege of cross-examination, but I am going to overrule you on the theory that a doctor who makes an examination for the purpose of making a report is limited to physical findings. All right, go ahead.

The Witness: Mr. Noteboom told me he had been injured on March 7th, 1956. At this time he he had been driving a loaded truck and an oncoming tanker truck——

The Court: Well, now, don't tell about that.

(Testimony of Dr. Edward W. Davis.)

who was on the right side of the road because that's for the jury to determine.

The Witness: He stated he was pinned in the cab of his truck and suffered the major injury to the leftside of his body where the impact occurred. He was unconscious for perhaps one to one and a half minutes. When he came to, he [76] saw steam rising and immediately thought that his truck might be on fire and made extreme efforts to extricate himself from the cab. He was finally able to free himself but does not remember too much of what happened following that. He was hospitalized overnight in Eugene where multiple lacerations were sutured, and because of extensive lacerations over the left knee his left leg was in a cast for the following three weeks.

Following the accident, he had a very severe headache which was primarily over the frontal area. At first this headache was continuous but within a few days it became intermittent. He still has the same type of headache which occurs over the frontal area. Usually he wakes in the morning without headache but as the day progresses he develops more and more headache. He has had his eyes checked and has been given a prescription for glasses which has had no effect on the headache. He states that he has had two episodes of transitory dizziness since the accident but other than this has had no persistent dizziness. The man returned to work approximately one month after the accident and has been working since that time.

(Testimony of Dr. Edward W. Davis.)

In the accident he suffered a good deal of bruising over the left side of the hand, along with a laceration over the dorsum of the hand. He states that this still bothers him somewhat and there is a numb sensation [77] over the knuckle. He also suffered some crushing injury to the left foot but this does not bother him at the present time. In cold weather the left knee still gives some pain but other than this seems to be getting along satisfactorily. He also complains a little of the left elbow at times when he states that he can feel a loose bone over the point of the elbow.

In going through his past history, there was nothing of significance. His only operative procedure has been an appendectomy, and he has had no previous serious accidents.

On examination this is a very large man who is 6 feet, 5 inches tall and weighs 260 pounds. His blood pressure was normal. There was a scar over the back of the left-hand in the region of the fourth and fifth metacarpophalangeal joint, which is in this area (indicating). This portion of the hand is still slightly swollen as compared to the right. There is an area of sensory disturbance around the laceration. That is, right at the area of the scar there is a small area where the sensations are not normal as it is in the other parts of the hand. There are multiple scars over the left knee, but there is no restriction of motion in the knee joint.

Movements of the cervical spine are intact, but there is considerable tenderness to pressure over

(Testimony of Dr. Edward W. Davis.)

the [78] occipital muscular attachments, which is where the neck muscles come up and attach into the back of the head in this area (indicating). There is also residual acute tenderness in the scalp in the mid-occipital region. In the back here (indicating), and it is at the point where he stated he had had a large swelling after the accident. A bump had come up there. The neurological examination was essentially negative. The cranial nerves were tested from one through twelve, and those were all normal.

Sensation over the extremities and the trunk was normal except for this small area over his hand near the scar. Motor power in all muscle groups was good and there was no atrophy or wasting of the musculature. His co-ordination was normal. His reflexes were all equal except for the right Achilles reflex, which is a reflex at the ankle, and this seemed to be diminished. I was unable to correlate this with anything that occurred in the accident.

In other words, there is no other finding to go along with this that had suggested that he had sustained any injury at the time of the accident which accounted for this.

I had X-rays taken of the skull, left knee, left elbow, left hand and these showed no evidence of fracture or abnormality. It was my impression after this examination that this man had sustained a mild brain concussion as well [79] as multiple contusions and lacerations over his arm and leg which have been mentioned. His major complaint

(Testimony of Dr. Edward W. Davis.)

seemed to be that of headaches which I thought was a residual post-traumatic type of headache, and by that, I mean a headache which sometimes we see after a bump on the head such as he had and a mild concussion. I did not feel that there was any serious or permanent damage to the brain or central nervous system. It was my feeling that these headaches would gradually subside with the passage of time.

Mr. Vergeer: You may inquire. Just a minute, doctor—well, no that's all. You may inquire.

Cross-Examination

By Mr. Gearin:

Q. Dr. Davis, these headaches that the man told you about, you couldn't find anything objective as to why those come up, could you?

A. Only that he had some tenderness here (indicating). At the time, I did not think that that tenderness was particularly related with the headache.

Q. All right. Now, doctor, in making your diagnosis of a brain concussion, you say it was mild? You based that in part upon the history that he gave you that he was unconscious?

A. Yes, sir.

Q. All right. Now, assuming, doctor, that he was not [80] unconscious, would that have a bearing on your diagnosis?

A. I doubt in this case. I think certainly he was confused after that. He had sustained a head in-

(Testimony of Dr. Edward W. Davis.)

jury. Certainly from the history I obtained he did get a pretty good bump on the head and was certainly confused, and I think that would be enough to account for his symptomatology.

Q. Well, doctor, in such an injury that he described to you, you would naturally assume that he would have headache after the accident. I think he told you that he had severe headaches following the accident? A. Yes, sir.

Q. I want you to assume, doctor, this statement. Assume that he did not have headache of any kind for a period of at least nineteen days after the accident. Would that have a bearing upon your present prognosis?

A. It would have a bearing on my interpretation of what those headaches were due to.

Q. All right. Now, assume, doctor, that he was not unconscious and assume that he had no headache for a period of nineteen days following the accident. Would you then have an opinion that he had a concussion?

A. If he had no mental concussion and no—was not unconscious at all, I would think he did not have a concussion from your definition of the word.

Q. In the case of a blow to the back of the head of what [81] significance would it be that the patient did not have, say, headaches immediately following the accident?

A. I would then feel that probably these are not post-traumatic headaches. Usually those come on immediately and begin to taper off.

(Testimony of Dr. Edward W. Davis.)

Q. Doctor, you found no restriction of motion in the knee joint? A. No.

Q. And the neurological examination was negative? A. Yes, it was.

Q. And your examination was primarily a neurological examination?

A. That is correct, sir.

Q. The cranial nerves were intact?

A. Yes.

Q. And this motor power was equal and good in all the muscle groups? A. Yes.

Q. That's indicative of what, doctor?

A. That he was in good condition.

Q. In fact, I think that you found that he was in excellent physical condition, didn't you?

A. Yes, sir.

Mr. Gearin: Thank you, doctor, I have no further questions. [82]

Mr. Vergeer: That's all. Thank you very much, doctor.

The Court: That is all. You are excused from further attendance at this trial.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Vergeer: We will call Mr. Burton. [83]

ROY BURTON

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Burton, will you state your name for the jury?
A. Roy A. Burton.

Q. And where do you live, sir?
A. Salem.

Q. How long have you lived in Salem?

A. About nine years.

Q. And where were you living in March of 1956?

A. Camp Pendleton, California.

Q. That's the Marine Camp down there?

A. Yes, sir.

Q. And about that time were you about to be discharged?

A. No, sir, I was coming home on leave.

Q. Coming home on leave, and was there anyone with you?

A. Yes, sir, I picked up a hitchhiker.

Q. What sort of an automobile were you driving?
A. An English Hillman-Minx.

Q. About how big a car is that?

A. Very small.

Q. A very small size. And you had come from California; is that right? [84]
A. Yes, sir.

Q. Now, what time did you leave Klamath Falls, do you think?
A. I don't recall, sir.

Q. Did you at any time before you saw an accident occur later in the evening, did you at any

(Testimony of Roy Burton.)

time see a Pacific Intermountain Express tanker and trailer?

A. Yes, I picked them up at the intersection of the main highway.

Q. That's about how far from where the accident happened? A. I have no idea, sir.

Q. Well, three or four miles anyway?

A. Well, I don't know, sir. It was dark, and I didn't know the road.

Q. I see. All right, and did you then follow this vehicle? A. Yes, sir.

Q. About how far behind, would you say?

A. Far enough to be able to see his lights clearly. I don't know the exact distance.

Q. Did he kick up any snow as he traveled along? A. Yes, he did, not a lot.

Q. And you stayed out of that?

A. Yes, sir.

Q. About how fast was he driving?

A. Between thirty and forty, sir.

Q. Now, did you at any time before the accident see the [85] headlights of the Converse Trucking Company which was later involved with this truck?

A. Yes, sir.

Q. Now, will you tell the jury what you saw?

A. Well, I saw the other truck approaching. It seemed to be up above me and coming toward me on a downgrade.

Q. Yes.

A. And I seemed to be going downgrade myself.

Q. You were going downgrade yourself?

(Testimony of Roy Burton.)

A. Yes, sir.

Q. About how far were you apart at that time?

A. Between which truck, sir?

Q. Well, when you first saw the Converse truck coming?

A. I couldn't state the distance. It was snowing—not snowing but white, and I had bright lights.

Q. It was quite some distance?

A. Yes, sir.

Q. You saw it for some time then?

A. Yes, sir.

Q. All right. Now, as the two trucks approached each other, will you tell the jury where each was driving with respect to its right-hand side of the road?

A. They were both on their own side.

Q. And then what happened?

A. I seemed to see the truck ahead of me sway just slightly [86] and then everything went black and I thought we were in a tunnel.

Q. You saw the truck in front of you sway a bit?

A. Just a little bit.

Q. And then the lights went out; is that it?

A. Yes, sir.

Q. Now, was that about when the lights had reached each other?

A. It was just as—I thought they went into a tunnel and disappeared.

Q. What did you do?

A. Turned on my high beams.

Q. And then what did you see?

(Testimony of Roy Burton.)

A. The Converse truck in front of me.

Q. And how far away was it then?

A. I don't know, very close.

Q. What did you do?

A. Shifted down and went off the road.

Q. You drove off the road? A. Yes, sir.

Q. In the snowbank? A. Yes, sir.

Q. Now, the last you saw of these trucks as they were approaching with their lights on and traveling along, and before the truck started to sway, the one truck, were both [87] trucks on their own side of the road?

A. I would say they appeared to be.

Q. To your best recollection and your best judgment they were; is that right? A. Yes, sir.

Q. What did you do; did you get out of your car?

A. Yes, sir, we jumped out and ran to the truck and went looking for the driver.

Q. Which truck?

A. Of the Converse truck.

Q. Did you look for him?

A. Yes, sir, we could hear him but couldn't find him.

Q. I beg your pardon?

A. We could hear him but not find him.

Q. What did you hear? A. Moaning.

Q. And did you finally find him?

A. Yes, we found him up in the cab.

Q. What side of the cab did you reach?

A. It seems like it was the right-hand side, sir.

(Testimony of Roy Burton.)

Q. And that was over by the snowbank at that time?
A. Yes, sir.

Q. What did you do about him?

A. Well, we tried to pull him out, and he came out and fell into our arms. [88]

Q. I see. What did you do with him?

A. I didn't take him from there. The other driver, I believe it was, and my passenger took him.

Q. Was the man, at that time, did he seem to know where he was going?

A. I didn't even stop. I just turned around and ran.

Q. Why did you do that?

A. I wanted to get my car turned around to stop any traffic?

Q. And did you do that?
A. Yes, sir.

Q. How long did you hear this man moaning before you located him finally?

A. Not a great amount of time, sir. I don't know as far as time goes.

Q. But you had gotten—stopped your car and gotten out of it and walked over to the truck?

A. Yes, sir.

Q. You don't know any of the parties in this lawsuit, do you?
A. No, sir.

Mr. Vergeer: That's all. You may inquire.

(Testimony of Roy Burton.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Burton, immediately after the accident, did you hear any explanation made by the driver of the P.I.E. tank [89] truck and trailer?

A. Yes, sir.

Q. All right. Will you tell what you heard him say?

Mr. Vergeer: Well, no, your Honor, I would object to it. Awhile ago I asked that the officer be permitted to say what the P.I.E. driver said, and I was stopped from doing that and I would object now.

The Court: Just because in this case your man is also plaintiff in the case?

Mr. Vergeer: No, he is asking what the P.I.E. driver said.

Mr. Gearin: It is part of the *res gestae*, your Honor. The question was directed to a time immediately after the accident, and it was confined to an exclamation.

The Court: Do you want the other in, too? All right, call the officer back.

Mr. Gearin: Well, I don't—If it's part of the *res gestae* it's not in——

The Court: How long afterward did you get up there?

The Witness: I got there immediately.

The Court: Well, how long is immediately?

(Testimony of Roy Burton.)

The Witness: Well, the trucks were still moving a little bit, the big truck.

The Court: Two minutes, one minute?

The Witness: No, sir, I was right on top of them after they hit. [90]

Mr. Vergeer: Well, your Honor, I would like to object to this because apparently the first he did was to run over to the one driver and when he found him he fell out of the cab in his arms and then he went over to move his car and apparently it was after that time.

The Witness: No, that was after. When we were running to the wreck, the other driver was out there hunting, too.

The Court: I am not going to permit it unless you agree to permit the other one to come in.

Mr. Gearin: Well, my point was that fourteen minutes—it was fourteen minutes afterwards, your Honor. I have no further questions.

Mr. Vergee: That's all I have.

The Court: The witness is excused.

(Witness excused.)

Mr. Gearin: Mr. Burton, will you remain in the courtroom until the recess, please?

Mr. Vergeer: We will call Mr. Sadoff. Before we do that, I believe we have a stipulation as to the damage to the tractor; is that correct, the trailer, pardon me?

Mr. Gearin: Yes, the amount in controversy is

Converse Trucking, \$650. P.I.E. is \$2,026.68, which we stipulate is the amount of their damage.

Mr. Vergeer: It has been so stipulated, your Honor.

The Court: So now call your next witness. [91]

Mr. Vergeer: That takes care of the Converse Trucking Service claim as to the amount of the——

Mr. Gearin: Yes.

Mr. Vergeer: We will now call Mr. Sadoff.

The Court: Tell me that amount again, will you?

Mr. Gearin: \$2,026.68.

The Court: Ladies and gentlemen, it's stipulated that if Converse is entitled to collect, it is entitled to collect for the damage done to the trailers, \$2,026.68 without any further proof. I want to point out to you that Mr. Gearin is not admitting that his clients are liable to that amount. He just admits that if you find that Converse is entitled to collect under the rules of law that I will give you, that is the amount they should collect. [92]

HYMAN A. SADOFF

was thereupon produced as a witness on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Mr. Vergeer: Well, I think, your Honor, if I may, I will recall this witness. He has been around, and we can bring in his testimony later. I think that so the order of testimony is right I should put on Dr. Teller's deposition regarding the condition of Mr. Noteboom.

The Court: All right.

Mr. Vergeer: I think it would make more sense that way.

The Court: Mr. Sadoff, would you please sit down?

Mr. Vergeer: How would the Court prefer to do this?

The Court: Mr. Burns, will you take the stand? Give him—what is the name of it?

Mr. Gearin: Teller.

Mr. Crookham: George Teller and the Court Reporter was Robert Frolik, your Honor.

The Court: Where is the deposition?

Mr. Crookham: Well, I understood that the deposition was being mailed directly to the court. Both Mr. Gearin and I have received our copies.

Mr. Gearin: He may have mine, your Honor.

The Court: Ladies and gentlemen, Dr. Teller lives in Eugene, Oregon, and it was agreed that in lieu of him coming here to testify in person, the plaintiffs could [93] take his deposition. Now, the testimony of a witness can be received in various ways. One, if he comes in and testifies here in person; another manner is to take the testimony of a witness under courtroom conditions. Now, Dr. Teller, before he testified, was sworn just as the witnesses here are sworn. That is, he agreed to tell the truth. He was interrogated by Mr. Crookham, and he was cross-examined by an attorney on behalf of the defendant, Pacific Intermountain Express Company. And in this case the questions which were asked by Mr. Crookham will be asked in this hear-

ing by his associate, Mr. Vergeer, and the questions propounded to him on cross-examination will be propounded by Mr. Gearin. Now, the witness, Mr. Keith Burns, will act as Dr. Teller, and he will read the answers given by Dr. Teller at the hearing. The testimony of a witness who appears by deposition is to be judged in accordance with the same rules that I will lay down for you, for witnesses who appear here in person.

Mr. Gearin: Your Honor, we waive the doctor's qualifications, and we will start at the bottom of page 3.

The Court: All right.

DEPOSITION OF DR. GEORGE TELLER

Mr. Verger: Beginning about one line up from the bottom of page 3, you will find the question, "Doctor, in the course of your capacity as a physician, were you consulted for treatment by Donald H. Noteboom? [94] A. I was.

"Q. And can you tell me when you first saw Mr. Noteboom?

"A. I first saw Mr. Noteboom about five o'clock in the morning on March the 7th, 1956.

"Q. And where did you see him?

"A. In the emergency room of this hospital.

"Q. And what was his condition at that time, doctor?

"A. The patient was in no acute distress but had sustained multiple injuries, as quoted to me, in an accident several hours prior to admission.

(Deposition of Dr. George Teller.)

“Q. And would you tell me what treatment, if any, you gave Mr. Noteboom on this, that occasion, and your findings?

“A. Excuse me, just a minute. Do you want this? Do you want this in detail now or do you want just what I did in the emergency room or—

“Q. Would you tell us in the emergency room, and then what you did subsequently?

“A. The patient was examined in the emergency room and the following physical examination was noted. Physical examination—you want blood pressure and all that stuff?

“Q. No. Your positive findings.

“A. The patient was found to have a large egg-size swelling over the back of his head. However, there was no laceration at this spot. The remainder of the physical exam was entirely normal except for the following: The left lower [95] extremity or physical examination of the left lower extremity revealed a deep 3-inch transverse tearing-type laceration, just distal to the patella or kneecap, which penetrated into the kneejoint. There was also swelling about the left ankle and a small tearing-type laceration over the left elbow or the olecranon process. There was a deep laceration about 1 inch in length just proximal to the metacarpophalangeal joint between the ring and the middle finger on the dorsum or back of his hand. The patient was admitted to the hospital for further observation and repair of the lacerations. Later in the morning he was taken to surgery where the wound of the left

(Deposition of Dr. George Teller.)

knee was cleansed, debrided and washed thoroughly and sutured with numerous silk sutures. Pressure dressings were placed on the left-hand wound and the left-elbow wound and the patient returned to the ward. Do you want me to tell when I later saw him?

“Q. Yes.

“A. He was seen by me on two occasions thereafter for further observation and removal of his suture; the last time being seen on March 26th and the patient's condition was considered most satisfactory at that time.

“Q. How long did he stay in the hospital, doctor?

“A. He was released from the hospital approximately at eleven a.m. on the 8th of March.

“Q. That would be the day after? [96]

“A. The day following his accident.

“Q. Did he have any casts on at that time?

“A. At the time of dismissal, he was wearing a posterior leg sprint on the leg of the bad or of the knee laceration.

“Q. Doctor, when you first saw him on the morning on the 7th, do you have an opinion as to whether he had recently sustained a concussion?

“A. At the time I saw the patient he was mentally alert and not suffering from evidence of severe head injury, and he had stated he had not been rendered unconscious at the time of the accident.

“Q. Would the presence of this egg-shaped lump on the back of the head, I think is where you said

(Deposition of Dr. George Teller.)

it was, would that indicate to you that he probably had had a mild concussion?

“A. Yes. In presense of the large lump or hematoma over the back of his head and even in the absence of bony damage to the skull as evidenced by skull X-rays, it is presumable that the patient could suffer from a mild type concussion.

“Q. Actually, doctor, what is a concussion?

“A. A concussion is a type of severe jar sustained to the head.

“Q. Doctor, Mr. Noteboom has testified in his deposition that he was unable to work for approximately one month. Do you feel that that is consistent with the injuries that [97] you found?

“A. I would say that's very consistent with his injuries.

“Q. Mr. Noteboom has also indicted in his deposition that he is suffering from headaches which are not necessarily present in the morning but develop during the course of the day and that these have continued since the time of the accident. Assuming that Mr. Noteboom has such headaches, doctor, do you have an opinion as to whether they probably result from the condition that you found?

“A. I think it is reasonable to assume that anybody having sustained multiple injuries, including one to the head, could have symptoms manifested by headache for some time after an accident such as this one.

“Q. Do you feel that that's probably the situation here? A. It's quite probable.

(Deposition of Dr. George Teller.)

“Q. I think you told us, doctor, that you saw Mr. Noteboom again on the 17th and again on the 26th of March? A. That is right.

“Q. And what did you do for him on each of those occasions?

“A. On the 17th he was merely examined and found to be progressing satisfactorily and one suture was removed from his knee at that time and the wound redressed. Then on the 26th of March the remaining sutures were removed and the patient dismissed.

“Q. How were the wounds to the hand and the elbow? [98]

“A. They were healing very satisfactorily.

“Q. Now, doctor, assuming a person of characteristics that you found Mr. Noteboom who manifests none of the things that you found on the morning of March 7th but who is a truck driver and is involved in a collision wherein two trucks going in opposite directions collide and the driver is in a badly wrecked cab, and assuming the condition that you found Mr. Noteboom in and the findings you specifically made on the morning of March 7th, do you have an opinion as to whether those injuries probably resulted from such an accident?

“A. Yes, I think within several hours after the accident and having seen the patient and examined him, I think these injuries were definitely sustained at the time of the accident.

“Q. Doctor, assuming Mr. Noteboom has the headaches that are described to you previously con-

(Deposition of Dr. George Teller.)

tinuing to the present time, do you have an opinion as to how long those headaches probably will continue?

“A. Well, that’s hard to say. I think it depends on various individuals. Some patients with the same injury would maybe never have experienced headache following the accident. Whereas, other patients these post-traumatic headaches may continue for several months. [99]

“Q. Well, do you have an opinion knowing these facts as to how long they will continue beyond the present time?”

Mr. Gearin: I will waive the objection that appears in the record, your Honor.

The Court: All right. Go ahead.

Mr. Burns: “Answer: No, because I haven’t seen him. I don’t know.

“Q. Well, what I am saying is assuming that——”

Mr. Vergeer: For the purpose of the record, I think I might say there is indication of discussion between counsel as to this question.

Mr. Burns: “Answer: Well I don’t believe I could say how long.

“Q. Doctor, I will ask you if you waive reading and signing of this deposition?

“A. Yes.

“Q. Doctor, what were the charges made for the hospital and surgical services for Mr. Noteboom?

(Deposition of Dr. George Teller.)

“A. The total fees, hospitalization, surgery room and the doctor’s fee was a total of \$171.60.

“Q. Doctor, in your opinion is that a reasonable charge?

“A. I think it is most reasonable. As I recall, I spent a couple of hours in there with that guy with that knee.”

Cross-Examination

By Mr. Gearin:

“Q. Doctor, in giving your testimony this morning you have [100] referred to your notes and apparently that is your chart that you kept at the time? A. Right.

“Q. Can I see that, doctor?

“A. The hospital chart and the post-hospital followup.

“(Documents handed to counsel for examination.)

“Q. As I understand your testimony, doctor, and it also appears on your notes, that the patient was not rendered unconscious in the accident?

“A. That is correct.

“Q. Now, on your record that you have here, I notice that you have indicated the date last treated was March 26, 1956? A. That is right.

“Q. And that’s the last time you have seen this patient? A. Last time I saw the patient.

“Q. Has he, to the best of your knowledge, been treated any further in this hospital?

“A. Not that I know of.

(Deposition of Dr. George Teller.)

“Q. You have written on here, ‘Question: Further treatment necessary?’ And you have indicated your answer, ‘No.’ Was that your opinion at that time?

“A. That was my opinion when I last saw the patient.

“Q. Yes. Has anything happened since that time to change that opinion, doctor?

“A. No. [101]

“Q. And you have also asked the question on your medical report, ‘Anticipated complete recovery?’ And you have indicated your answer, ‘Yes,’ Is that still your opinion, doctor?

“A. That’s right.

“Q. So far as your opinion at this time is concerned then, based upon your full knowledge of the injuries sustained by this particular patient, it would be your opinion, I take it now, that he should have a complete recovery from these injuries?

“A. That was my opinion when I last saw the patient, yes.

“Q. And has anything happened since then to change that opinion?

“A. I haven’t seen him or heard from the patient.

“Q. Your testimony also was, as I recall, that X-rays of the head were taken and that there was no bony injury? A. That is correct.

“Q. Your testimony also was, as I recall, that there was no laceration of any part of the head?

“A. That is correct.

(Deposition of Dr. George Teller.)

“Q. The only thing then that you found was this lump on the back of the head and this hematoma or bruise, is that right?

“A. The lump which was a hematoma, yes.

“Q. And what is a hematoma, doctor? [102]

“A. A hematoma is a blood clot caused from any injury to the scalp or other tissue which is actually bleeding in the tissue.

“Q. Yes. Was any treatment rendered to his head for that hematoma? A. No.

“Q. Was it the type of a hematoma that you would expect naturally to absorb within the tissues?

“A. That is right.

“Q. So ordinarily one would not give any medical treatment for such a hematoma?

“A. That is right, except observation,

“Q. Yes. Now, on your chart you have indicated that his last examination revealed that his condition on March 26th, 1956, was most satisfactory?

“A. That is correct, I believe.

“Q. Would that include the condition on the back of the head, the hematoma? A. Yes.

“Q. Had that cleared up by that time?

“A. If I recall, it was practically cleared.

“Q. Now, doctor——

“A. Or not practically; it was, definitely.

“Q. It was all cleared up? A. Yes. [103]

“Q. I take it from your testimony and from your record here that there was no complaint made by him at that time of headaches?

(Deposition of Dr. George Teller.)

“A. Not to the best of my knowledge or my record, no.

“Q. So far as you know, he was not complaining of headaches during the period of approximately three weeks in which you treated him?

“A. May I see that? How was that question?

“Mr. Gearin: Would you read it back to him.

“(Whereupon, last question was read back by the reporter.)”

Mr. Burns: And the answer is, “That is correct.

“Q. Your answer, doctor, to that question is that he was not complaining of headaches, is that correct?

“A. That is correct.

“Q. Well, then so far as your own knowledge is concerned, you don’t know that he ever had any headaches from this accident, do you not?

“A. That is right.

“Q. Now, speaking in terms of medical probabilities, doctor, if we assume that the man was not complaining of headaches to you during the period of three weeks immediately following the accident in which period you were treating him for the injuries allegedly sustained in the accident, and assuming that he did not lose consciousness in the accident, and that [104] there was no laceration to any part of the head but only a hematoma on the back of the head, and that there was no bony injury to any part of the head and that the plaintiff is not complaining of any inability to work resulting more than one month beyond the accident, would you ordinarily assume under those circumstances that there would be a

(Deposition of Dr. George Teller.)

probability of headaches resulting from that particular trauma and carrying on until this time?

“A. Here we go with that probability and possibility business. Well, I think it’s very possible that even though the patient did not complain of headache during the time he was observed by me, and I know that in some instances it has happened that patients do develop headaches at a later date following trauma of this type——

“Q. We have to speak of probabilities, doctor; **not possibilities.**

“A. Well, I think it is reasonable. That it is probable that he could, even in the face of not having complaint at the time of observation.

“Q. On a concussion to the head, if it is a severe concussion, is there not usually a temporary loss of consciousness at the time of trauma?

“A. I believe I would say yes.

“Q. Well, then, doctor. isn’t it probable that if there was not a temporary loss of consciousness, that any concussion he might have sustained would be a slight concussion? [105]

“A. Yes, I would say that this type of injury was a slight concussion.

“Q. Ordinarily on a slight concussion to the back of the head without bony damage, without laceration, and which concussion and the hematoma resulting therefrom is completely cleared up within twenty days thereafter, isn’t it probable that there would be no headaches resulting for any considerable period of time from such concussion?

(Deposition of Dr. George Teller.)

“A. Well, I don’t believe I could answer that as a probability. I think that depends on the individual.

“Q. Customarily there would be none from that type of a blow, am I right in that?

“A. Well, customarily, yes. However, that, too, depends on individuals I think.

“Q. Yes. Your testimony earlier was that the patient was mentally alert at the time you first examined him? A. That is correct.

“Q. This was, I believe, according to your recollection, some three hours after the trauma had supposedly been sustained?

“A. Approximately three hours, yes, or three or four hours.

“Q. Three or four hours?

“A. Three or four hours.

“Q. Ordinarily, doctor, speaking in terms of medical probabilities, if a person has sustained a concussion to the brain and is going to have headaches from the concussion, [106] won’t those headaches ordinarily start within a week of the trauma?

“A. I think normally they would start some after the injury.

“Q. Yes. Well, wouldn’t one ordinarily——

“A. Or at least at the time of the injury.

“Q. Well, they would ordinarily start at least within three weeks, would they not, of the injury?

“A. Well, one would presume that, yes.

“Q. And wouldn’t they, as a matter of fact, ordinarily start, doctor, within three hours of the injury? A. Well, not necessarily so.

(Deposition of Dr. George Teller.)

“Q. No, but just speaking in probabilities?

“A. Probably, I would think one would experience that, yes.

“Q. And when you first examined him and took the history of what happened to him, did you not write down in your notes all of his complaints?

“A. I did.

“Q. And did they not include any headache?

“A. They did not include headache at that time.

“Q. Now, doctor, did you form an opinion at the time of your treatment as to any period of disability which might result to the patient by virtue of a trauma of which he was complaining?

“A. Yes, I did.

“Q. And what was your opinion at that time as to the [107] duration of any disability?

“A. It was my opinion at that time that his disability would be approximately two to three weeks.

“Q. After the trauma?

“A. After being released from the hospital.”

Redirect Examination

By Mr. Vergeer:

“Q. Doctor, your opinion on two to three weeks was just an estimation at that time?

“A. That is correct.

“Q. And it could have been longer, a longer period?
A. Yes, within reason.

(Deposition of Dr. George Teller.)

“Q. And do you feel that a month is inconsistent with your initial estimate of two to three weeks?

“A. Well, I think at the time of the estimate two or three weeks or even four weeks is all within the realm of possibility.

“Q. Doctor, Mr. Noteboom’s deposition indicates that immediately following the accident he was in a dazed condition. Would that be consistent with your finding of concussion? A. Yes.

“Q. Was he a co-operative patient throughout the treatment? A. Very co-operative.

“Q. Was he the complaining type?

“A. No, not at all.

“Mr. Vergeer: Thank you very much.” [108]

Recross-Examination

By Mr. Gearin:

Q. “Doctor, counsel asked you if it was a fact that he was in a dazed condition after the accident would be consistent with your finding of concussion. Now, doctor, as a matter of fact, from going over your notes I see that you did not make any finding of concussion. Am I correct in that?

“A. That was a misunderstanding on my part. As far as my records, I had no record of him being in a dazed—that was my, a misunderstanding. I thought you said he had stated he was in a dazed condition.

“Mr. Verger: Yes, that is correct, doctor.

“A. But as far as my findings, I did not have a record of him being in a dazed condition.

(Deposition of Dr. George Teller.)

“Mr. Vergeer: Oh, you stated at the time you saw him he was clear and bright.

“A. That is right.

“Mr. Vergeer: And what I had reference was Mr. Noteboom’s deposition where he described himself as being dazed immediately after the accident without saying how long a period that condition continued.

“A. Yes. He did not describe that to me, however.

“Q. Now, doctor, as a matter of fact, you did not make any finding of concussion, did you? [109]

“A. Not at the time, no, I did not.

“Q. And have you ever made any finding of concussion?

“A. No, I have not seen him since that time.

“Mr. Gearin: That’s all.

“Q. (By Mr. Vergeer): You did have in your history the fact that he struck the back of his head in the cab at the time of the accident?

“A. I did, yes.

“Q. And you ascribed the hematoma that you found in the mid-region of the back of the head to such a blow? A. That is right.

“Mr. Vergeer: Thank you very much.”

The Court: Very well. I think that this is a good time to take our afternoon recess. You are now excused for about ten minutes.

Mr. Vergeer: May I make an offer of proof, please?

The Court: Yes.

Mr. Gearin: Mr. Burton, please, will you take the stand. [110]

ROY BURTON

was thereupon recalled as a witness on behalf of the defendant for the purpose of an offer of proof, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Burton, immediately after the accident, did you hear any exclamation made by the driver of the P.I.E. truck?

A. Yes, he was saying he couldn't get away from it. He kept exclaiming that.

Mr. Gearin: I have no further questions.

Mr. Vergeer: No questions.

Mr. Gearin: That's all, your Honor.

The Court: Couldn't get away from it?

Mr. Gearin: Yes, sir.

The Court: All right. Do you want to change your mind?

Mr. Vergeer: No, your Honor, I think if we should have anything that this man stated about the happening of the accident, we should have all of it. I don't think it would be fair.

The Court: I don't care. There is some question in this, so I will continue with my ruling, but if you want me to——

Mr. Vergeer: No, I think that's correct, your Honor.

The Court: From a technical point of view, I

don't [111] think their showing is sufficient because it is meaningless. Recess.

(Whereupon, a short recess was taken.)

The Court: Call your next witness.

Mr. Vergeer: We will call Mr. Sadoff. [112]

HYMAN A. SADOFF

was thereupon recalled as a witness on behalf of the plaintiff, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Will you state your full name, please?

A. Hyman Sadoff.

Q. And where do you live?

A. 12219 Southwest Lesser Road.

Q. Is that in Portland? A. That's right.

Q. How long have you been a resident of this area? A. For the last twelve years.

Q. And what is the nature of your business?

A. I am in the truck leasing business and truck repair.

Q. Do you have any relationship to Samac, Inc.? A. Yes, I am the president.

Q. Now, Mr. Sadoff, in connection with the affairs of Samac, Inc., you have been in court here and testified today, haven't you?

A. Yes, I have.

Q. Who was the owner of the truck that was

(Testimony of Hyman A. Sadoff.)

being operated by the Converse Trucking Service at that time?

A. The owner of the truck was Samac, Inc.

Q. That's the truck-tractor we are talking [113] about?

A. That's right.

Q. The Samac did not own the trailers?

A. No, sir.

Q. In that connection, was that tractor under any kind of an agreement to Converse Trucking?

A. Yes, it was.

Q. I will ask the bailiff to hand you Samac's Exhibit No. 9, and I will ask you what that is?

A. This is an annual lease to Truck No. 230.

Q. Is that the truck that was involved in this collision?

A. That's right.

Q. How many trucks are operated by Samac?

Mr. Gearin: That's immaterial.

Q. (By Mr. Vergeer): Pardon me, how many trucks does Samac own?

Mr. Gearin: That's immaterial, your Honor.

The Court: I don't know what the purpose of it is. I don't see any object to it.

Q. (By Mr. Vergeer): We will connect it up. How many trucks?

A. Well, at this particular time, five.

Q. All right, at the time of the accident?

A. That's right, five.

Q. How many of them were leased to Converse?

A. Four.

Q. Is that lease the one covering the truck in

(Testimony of Hyman A. Sadoff.)

question [114] and the operation in which it was engaged on the occasion of this accident?

A. Yes, it is.

Mr. Vergeer: We will offer that lease, your Honor.

Mr. Gearin: No objection.

The Court: Admitted.

(Whereupon, Samac's Exhibit previously marked Exhibit 9 for identification was received into evidence.)

Q. (By Mr. Vergeer): When did you last see that tractor immediately before the accident?

A. That was the night of the 6th, approximately 4:30-5:00 o'clock.

Q. The 6th of March, 1956?

A. That's right, '56.

Q. All right. What condition was that tractor in immediately prior to the accident?

A. Good operating condition.

Q. Did you see it after the accident?

A. Yes, I did.

Q. And where did you see it after the accident?

A. Up on top of Willamette Pass, close to the junction there.

Q. Now, there have been a number of pictures introduced and some of these are Samac's Exhibits. You have seen those pictures, have you? [115]

A. Yes, I have.

Q. Do they correctly depict the tractor as it looked after the accident?

A. Yes, they do.

(Testimony of Hyman A. Sadoff.)

Q. What kind of a tractor was this, and tell us about it?

A. Well, it was a 1953 International tractor, 116-inch wheel base, and it was powered with a Cummins' engine and two-speed differential for pulling these trains or duals, as you might call them.

Q. How many speeds in the transmission?

A. There were five speeds on the transmission.

Q. And a two-speed differential?

A. That's right.

Q. So that you could change the speed in the differential from high to low?

A. That's right.

Q. So that altogether you had how many speeds on that truck? A. Ten speeds.

Q. Mr. Sadoff, are you familiar with the reasonable market value of trucks of the type involved in this accident as of the date of the accident?

A. I think so.

Q. Have you bought and sold a number of trucks?

A. Well, I have bought a considerable amount of them. I haven't been able to sell any yet.

Q. You have purchased a number of trucks, however? [116] A. That's right.

Q. And do you know the reasonable market value of that truck as of the time of this accident, before it was damaged? A. Yes, I do.

Q. What was the reasonable value of that truck at that time? A. Approximately \$9,500.

Q. After the accident, do you have any knowl-

(Testimony of Hyman A. Sadoff.)

edge of the market value of that truck after the accident?

A. There was a bid submitted for the salvage.

Q. Well, do you know what the reasonable market value of that truck was after the accident; was it top value that it had immediately after the accident?

A. Well, nothing whatsoever as far as I was concerned.

Q. How about market value, are you talking about market value?

A. Well, there wouldn't be any market value on a piece of wrecked merchandise.

Q. Did you have a bid for it; did someone offer to buy it from you? A. Yes, I did.

Q. And what was the bid you could get for it?

A. \$1,400.

Q. Did you sell it? A. No, I didn't.

Q. Was the truck repaired?

A. Yes, it was. [117]

Q. And in whose shop was it repaired?

A. In my own shop.

Q. Now, at the time was it—what was the nature of the repairs, generally, that were required to that tractor?

A. Well, first off, we released the frame and overhauled the transmission, straightened the differential housing and overhauled the differential. Replaced some tires on it which were cut and damaged and repaired the engine and the front springs, and we also replaced the fuel pump on the motor.

(Testimony of Hyman A. Sadoff.)

if I am correct, and we replaced the cab and superstructure complete.

Q. Was the cab in a condition where it could be repaired? A. No, it wasn't.

Q. Was a new cab of the same identical make and type available? A. No, they weren't.

Q. What sort of a cab did you replace it with?

A. I replaced it with a '48 liner cab.

Q. Is that an improvement? A. Yes, it is.

Q. On the truck, it is an improvement?

A. Yes, it is.

Q. And that cab has a sleeper on it?

A. That's right.

Q. And your former cab did not? [118]

A. That's right.

Q. What is the difference in the value of those cabs?

A. Well, the International cab sold for \$1,300, I believe, at the time; right in that vicinity, and this liner cab sold for \$2,250 stripped at the time.

Q. Yes. How much money was spent; did you spend repairing the truck including the improvement by way of a different cab?

A. Well, in addition to what the bids were, there were approximately an additional \$3,000 spent.

Q. Well, now, you're speaking of some bids, and what were those bids?

The Court: What is the relevancy of that?

Mr. Vergeer: I don't—very well, I withdraw the question. I don't think it's relevant either, your

(Testimony of Hyman A. Sadoff.)

Honor. I would like to know what you actually spent in repairing the truck.

A. Approximately \$8,600.

Q. How much? A. \$8,600.

Q. Is that the money you spent repairing it?

A. That's right.

Q. Now, what happened to your contract with Converse Trucking Service?

Mr. Gearin: I object, your Honor, on the ground and [119] for the reason that the contract does not provide for any specific number of hauls to be made and as a matter of law there can be no recovery for anticipated profits unless a further showing be made which has not been made.

Mr. Vergeer: We are not asking for anticipated profits. We are asking for the damages for the interference with a profitable agreement which we had.

Mr. Gearin: On the further grounds of the objection being, your Honor, that there is no testimony that he rented or tried to rent or could not have rented another vehicle of like type.

Mr. Vergeer: That, of course, is something that counsel can bring out on cross-examination, your Honor.

The Court: Objection sustained.

Mr. Vergeer: Is the Court ruling that we cannot go into the question of the determination of this contract? I don't want—

The Court: I think you can, but you haven't made any kind of a showing here. I think that if

(Testimony of Hyman A. Sadoff.)

you are trying to obtain reasonable value of the loss of use of the truck, you will have to make a better showing than you have so far.

Q. (By Mr. Vergeer): Yes, that may well be, your Honor. All right. How long did it take you to repair the truck?

A. Well, sir, we actually spent the rest of the year on it.

Q. Now, had the truck been repaired—well, of course, [120] you say the parts for it weren't available; is that right? A. Not at the time.

The Court: How much does that truck cost new?

The Witness: \$16,500.

The Court: \$16,500.

The Witness: That's right.

The Court: How old was it at that time?

The Witness: At the time it was wrecked, sir?

The Court: Yes.

The Witness: It was two years and three months old, sir.

The Court: Two years and three months?

The Witness: That's right.

The Court: And you say it cost you how much to fix it?

The Witness: \$8,500, sir.

The Court: Well, you charge yourself labor; is that right? How many men did you have in your shop?

The Witness: At the time there were two men in the shop.

The Court: Go ahead.

(Testimony of Hyman A. Sadoff.)

Q. (By Mr. Vergeer): Very well. Now, what was the—how many miles did this truck run in performance of its contract with Converse Trucking Service?

Mr. Gearin: Objection, your Honor, on the ground, on the same grounds as before. The measure of damages for the loss of use is reasonable rented value.

Mr. Vergeer: Your Honor, our position in this case is, [121] this is not entirely a question of loss of use. Now, I don't know how the Court wants to handle that—

The Court: Where are your authorities?

Mr. Vergeer: We have some authorities here, your Honor.

The Court: All right. You come back tomorrow, and we will look at the authorities.

Mr. Vergeer: Very well, your Honor.

The Court: Give me your brief.

Mr. Crookham: I do not have it finished.

The Court: Objection sustained. You know, this is the time of trial, Mr. Crookham. You have done this time and time before, and I always ask you if you have your authorities. Go ahead, the objection is sustained.

Q. (By Mr. Vergeer): Now, what was the reasonable length of time necessary to repair this truck?

A. Well, if the parts had all been available—

Q. No, no, I am speaking now of the conditions that existed.

(Testimony of Hyman A. Sadoff.)

A. Well, they told me they would have it done in ninety days.

Q. What is the reasonable value of the use of that truck?

A. Per mile, per month, or what?

Q. For the manner in which it was used?

Mr. Gearin: Objection, your Honor, unless the witness first testifies that he rented another vehicle or he tried to and none was available.

The Court: Objection overruled. Go ahead. Do you [122] know what the going rate for a truck of this kind was?

The Witness: To rent one, sir?

The Court: Yes.

The Witness: It was the same thing as I was getting per mile.

The Court: All right.

Q. (By Mr. Vergeer): What were you getting per month for the use of the truck?

A. A little better than \$3,000; \$3,300, I believe.

Q. How many miles a month would the truck run.

A. Approximately 12,000.

Mr. Vergeer: On this contract question, your Honor, I wonder if I might have leave of the Court to submit—I have some authorities here on the matter.

The Court: All right, give them to me. What are your authorities?

Mr. Vergeer: Will you give the Court your citations?

(Testimony of Hyman A. Sadoff.)

Mr. Crookham: The one case we are relying on——

The Court: What are the facts of the case?

Mr. Crookham: I don't have my brief completed, your Honor, but I——

The Court: That's the reason I asked you, because I knew you hadn't read the case. You do that all the time.

Mr. Crookham: I am sorry, your Honor.

The Court: All right. Tell me the facts of the case [123] and tell me the other facts of the other cases upon which you rely.

Mr. Crookham: Well, I am not prepared to do that right now, your Honor.

The Court: Yes. This is the time of the trial. The case has been filed over a year. All right, go ahead. Motion is denied.

Mr. Vergeer: Very well, your Honor.

The Court: Because of a lack of preparedness of the counsel in addition to the other aspects.

Mr. Vergeer: I think you may inquire.

Cross-Examination

By Mr. Gearin:

Q. Mr. Sadoff, you say you spent \$8,500 to \$8,600 in repairing your truck yourself?

A. That's right.

Q. Do you recall when your deposition was taken March 1st, 1957 in Mr. Crookham's office: you were asked this question and you gave this answer? "All right, what was the cost of repairs?

(Testimony of Hyman A. Sadoff.)

Answer: The actual cost to have it repaired was more than any one of the estimates for this particular reason. We have gone a little more extensively into it. We have done more work. Question: What did it cost, approximately? Answer: I would make an approximate figure of \$10,000." Did you so testify? [124]

A. Yes, I did.

Q. Now, is \$7,000—or—is \$8,500 correct?

A. Well, at the time of the deposition it was the same thing as when you asked me of the cost per mile it would take to operate this vehicle. I had no figures in front of me, and after I had checked into the figures at my office as to cost per mile, I also checked into that and that is where I came up from the \$8,500.

Q. You say you had four trucks leased to Converse? A. That's right.

Q. And you made \$3,300 per month per truck?

A. That's right.

Q. So that you have a gross income, Mr. Sadoff, of \$158,400 from Converse. Did they pay you that amount of money?

A. I kind of imagine they did.

The Court: What did you say?

The Witness: I kind of imagine he did.

Q. (By Mr. Gearin): All right. Now, did you try to rent another truck? A. Yes, I did.

Q. Did you go to——

A. I tried to buy one.

Q. And none was available?

(Testimony of Hyman A. Sadoff.)

A. There was one truck at the time that a fellow owned that had leased to Pierce, and he is the manager of their Oakland [125] Branch, and I contacted him on the phone asking him if he would care to sell his truck because that was the only one in town that came up to the same specifications as the one I had. So he told me that he would consider it and think about it, and I could call him back later some time. I called him back within a week, and he said, "No, he would not care to sell it."

Q. Did you try to rent one?

A. Yes, I tried to rent one from Wiedel Trailer & Equipment Company.

Q. Did you try to rent one from United?

A. No, I didn't.

Q. Did you try to rent one from Consolidated?

A. No, I didn't.

Q. All right. Now, as a matter of fact, you had some bids for the repairs of this tractor, did you not?

A. Yes, I did.

Q. And Rowe Brothers' estimate was \$3,800, wasn't it?

A. I believe so.

Q. And International Truck Company was \$3,900, wasn't it?

A. I believe so.

Q. And White was \$5,090?

A. (Witness nods head in the affirmative.)

Q. Now, when you made your adjustment with the Phoenix and Home with regard to your collision coverage, you rounded [126] off the figure of your damages at \$5,769.46, did you not?

A. I believe that's right.

(Testimony of Hyman A. Sadoff.)

Q. And then subtracted from that was your \$1,000 deductible? A. That's right.

Q. Would you say that after this accident the truck had no market value other than junk?

A. Well, that was the bid that was submitted by Miller Truck Parts.

Q. Well, I will have to ask you, Mr. Sadoff, if it's not a fact that it was just nothing but junk when they got through with it? It was a total?

A. Pretty close.

Q. Well, would you answer that yes or no?

A. Yes.

Mr. Gearin: I have no further questions, your Honor.

Redirect Examination

By Mr. Vergeer:

Q. Now, counsel has asked you, Mr. Sadoff, about the Rowe Brothers Rebuilders & Equipment Company bid for \$3,800 and more dollars for repair. Did that bid include all the repair to the truck? A. No, it did not.

Q. Did it include the tires? A. No.

Q. Did it include the motor work? [127]

A. No, it didn't.

Q. Did it include the transmission?

A. No.

Q. How about the differential? A. No.

Q. The steering wheel? A. No.

Q. The frame? A. No.

(Testimony of Hyman A. Sadoff.)

Q. None of those things were included in that bid? A. None whatsoever.

Q. Now, as a matter of fact, the repairs that were bid on by any of these companies were, were any of these companies' bids for complete repairs?

A. No, they weren't.

Q. Did you tell me awhile ago how many miles this truck would run a month on this contract?

A. Approximately 12,000 miles a month.

Q. And how many cents a mile you made?

A. Thirty cents a mile.

Q. How much were the drivers paid, or do you pay the driver?

A. No, I don't pay the drivers. Converse Trucking Service pays them.

Q. And what is the monthly cost of fuel, oil and operating expenses on the truck that you pay and that comes out of your [128] part of this payment?

A. The driver's wages, the Oregon Public Utilities Commission, insurance, health and welfare, I mean, Drivers' Retirement Fund, and Washington State Tax.

Q. I will ask the Clerk to hand you Exhibit No. 11 of Samac, Inc. Perhaps you can refresh your memory from that. Now, can you tell the items that come out?

A. That come out of the thirty cents a mile? Yes, we have the cost of oil. That's fuel oil——

Q. How much would that run a month?

A. \$380.10.

Q. All right.

(Testimony of Hyman A. Sadoff.)

A. And the cost of motor oil with lubricating oil runs \$21.20. Now, the repairs on the tractor, now, all this is based on a 28 day month. The transmission repair is based on an over-all picture of a year and then divided by twelve is \$23.20.

Q. That's the maintenance on the transmission?

A. For one month. Motor repairs for one month is \$100. Differential repairs, \$73; tire chain repairs, \$8; brake lining, \$8; miscellaneous repairs, \$50 a month; wages computed at ten cents a mile, \$1,190.60; tires, \$96.33; insurance, \$12.36; Drivers' Pension Fund, \$30; fuel taxes, \$91.84. Total cost of operation for a 28 day month is \$2,092 and——

Q. Two thousand what? [129]

A. \$2,092.73.

Q. And what is the total income for the month?

A. The total income for the month of 11,906 is \$3,571.80. We also have one more for repair of five cents a mile to pay to the Public Utilities Commission, and I have a total of \$595.30.

Q. Does this come out of this gross income in addition to the figures you have given me?

A. That's right.

Q. And that cuts your net income down to what, per month?

A. The net income per month is \$883.77.

Q. Were you able, under the conditions that existed, that is, regarding the availability of replacement parts, to place this truck back on the road in ninety days? A. No.

Q. Considering the availability problem of re-

(Testimony of Hyman A. Sadoff.)

placement parts, what is the best you could do and did do?

A. Well, the best we did do was take the rest of the year, and we rebuilt it.

Q. And what is the best you could have done?

A. Well, I could have got it out—you mean if the parts were available?

Q. No, I mean under the conditions as they existed?

A. I would have gotten it done in 120 days.

Mr. Vergeer: That's all. [130]

Recross-Examination

By Mr. Gearin:

Q. Mr. Sadoff, you deduct the wages, driver's wages from that amount of 10c a mile, don't you?

A. That's a recommended figure of 10c a mile.

Q. All right. But you don't get 30c a mile, do you? You get \$22 a day and 11c a mile when you are empty? When they are deadheaded, don't you?

A. We have never deadheaded.

Q. Well, I am asking you if the agreement doesn't state that. Remember in your deposition I asked you this question: "Now, can you tell me,—" and I didn't pin you down on one answer, "What would be the reasonable period of time for repairing this rig? Answer: If the parts were available, I would say six weeks should have been sufficient." Did you so testify?

A. That's right.

Q. And on page 16, I asked you this question.

(Testimony of Hyman A. Sadoff.)

“Question: One other question. When you started to repair this, were the parts available? Answer: Most of them were. The ones I wanted weren’t. Question: What were they? Answer: Well, I was going to install a different cab on the truck, which I did. I mean, a different make cab; I was unable to purchase one of those until November of that year.” Did you so testify? A. Yes, I did.

Q. And if you really wanted to get it repaired in a hurry [131] with the same cab on it, you could have done it in five or six weeks, couldn’t you?

A. No, we couldn’t. The cab was obsolete. The cab was out of production.

Q. Where did you try to get a cab?

A. From the maker of the truck, International Harvester.

Q. All right. Did you try to buy another truck?

A. Yes, I did.

Q. Other than the one person that you mentioned? A. Yes, I did.

Q. And you tried one in California, you say?

A. I tried one with the Oakland Branch Manager of Pierce Freight Lines, and I also tried to purchase one from the White Motor Company.

Q. But they don’t make International trucks any more?

A. No, I don’t believe they do, but they were willing to sell me one of their own make at a much higher figure.

Q. In other words, you wanted to get a rig, but

(Testimony of Hyman A. Sadoff.)

you couldn't buy one at a price that you wanted to pay? A. That's approximately right.

Mr. Gearin: I have no further questions.

Mr. Vergeer: I think that's all.

The Court: That's all.

(Witness excused.)

Mr. Vergeer: That's our case, your Honor. [132]

The Court: All right.

Mr. Gearin: Call Mr. Woodworth. [133]

LARRY CURTIS WOODWORTH

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Woodworth, where do you live?

A. 5455 Southeast 52nd Avenue, Portland.

Q. What is your occupation?

A. Heavy equipment operator.

Q. You mean truck driver?

A. No—now, yes, sir, most of the time.

Q. All right. Now, have you had any experience in the investigation of traffic accidents?

A. Yes, I have.

Q. In what connection?

A. With the Oregon State Highway Patrol.

Q. And did you recognize the officer that testified earlier? A. Yes, I did.

(Testimony of Larry Curtis Woodworth.)

Q. All right. Now, directing your attention to the accident with which we are here involved, were you on the highway about the time the accident occurred? A. I was.

Q. Were you driving a truck at that time?

A. I was.

Q. By whom were you employed? [134]

A. West Coast Fast Freight, Incorporated.

Q. All right. And with reference to the set of doubles of Converse Trucking Service, had you seen those before the accident?

A. I didn't recognize them as such. I was following a truck.

Q. And did that subsequently turn out to be the truck involved? A. Yes.

Q. When had you first picked it up before the accident? A. Pulling Willamette Pass.

Q. And was the other truck ahead of you or behind you?

A. He was—the Converse truck was ahead of me.

Q. And do you recall where the rise is on the Eugene side of the accident? A. Yes, I do.

Q. All right. Before you got to the rise, how far were you behind the Converse rig?

A. Approximately a quarter of a mile.

Q. All right. What was your speed at that time?

A. It varied. Do you mean after we came over the top of the ridge?

Q. No, just before you got to the top of the ridge.

(Testimony of Larry Curtis Woodworth.)

A. Well, approximately fifty miles an hour down the hill and slowed down as I went up the other rise.

Q. All right. When you got over the rise and proceeded to where the accident occurred, did you see the other rig [135] ahead of you, and how far ahead of you was he at that time?

A. Approximately a quarter to a half mile, a little under a half a mile, a little over a quarter mile.

Q. As you—did I ask you who you were employed with now? A. No.

Q. Who are you employed by?

A. John L. Jersey, contractor.

Q. And as you came over the rise, how fast were you going?

A. Between forty-five and fifty miles an hour.

Q. And how far ahead—I asked you that. Now, was your truck or vehicle equipped with any timing or speed recording device?

A. Yes, it was equipped with a speedograph.

Q. All right. And what does a speedograph show? A. At which time, sir?

Q. Well, what does it show with reference to the speed?

Mr. Vergeer: I think the speedograph would be the best evidence, your Honor.

Q. (By Mr. Gearin): I am just asking him what they show.

A. It shows the speed traveled and the time of day and the stops and so forth, and it keeps an ac-

(Testimony of Larry Curtis Woodworth.)

curate check of the speed every minute. It's marked on the graph.

Q. All right. Now, did you see the collision?

A. Yes, I did.

Q. All right. From where you were, could you tell anything [136] about the manner in which it happened?

A. No, I couldn't. There was a lot of snow dust behind the Converse truck, and I did not see the P.I.E. truck at all until after the collision.

Mr. Gearin: Mr. Clerk, will you hand the witness Pretrial Exhibit No. 26, I think it's A? May I see it a moment? The other one, 26-B, please.

(Document handed to witness.)

Q. (By Mr. Gearin): I am handing you Pretrial Exhibit No. 26-B, Mr. Woodworth, and ask you if you can identify that?

A. Yes, I can.

Q. And what is that?

A. This is a speedograph chart for my run from Portland to Klamath Falls on March 6th, 1956.

Q. And does that indicate the speed at which you were traveling immediately prior to this accident?

A. It does.

Q. And what does it show, do you need a magnifying glass?

A. I can read it here.

Q. All right.

A. Approximately forty-three miles an hour.

Q. I see. And had you maintained that speed for some little while before the accident?

(Testimony of Larry Curtis Woodworth.)

A. Yes, and faster and slower, it veered up and down there.

Q. And during this period of time, how did the distance [137] between you and the Converse rig run?

A. Well, when we first started pulling this little raise just before the accident, I was fairly close, and when we broke over the last little hill there, where I could see over the hill, I could see he was a considerable distance ahead of me.

Mr. Gearin: We offer 26-B in evidence, your Honor.

Mr. Vergeer: No objection.

The Court: Admitted.

(Whereupon, Pretrial Exhibit previously marked Exhibit 26-B for identification was received into evidence.)

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Vergeer:

Q. You tried to pass the Converse rig, did you not?

A. No, I didn't. I never got close enough to pass him. I was—my intention was just in maintaining my speed, and at various times I got up behind him by going up a hill, but that's all.

Q. You were traveling faster than he was as you were coming up the hill; is that right?

A. You mean up the hill?

(Testimony of Larry Curtis Woodworth.)

Q. Right. Now, then, before you got to this last rise, when he reached the top of that last rise and broke over, [138] before going down toward the scene of the accident, how far were you behind him at that point?

A. Oh, a little less than a fourth of a mile.

Q. As you went up that hill—were you loaded?

A. Partially loaded, light load.

Q. What sort of a rig?

A. Semitruck and trailer, 40-foot semirig.

Q. What sort of power?

A. 200 Cummins.

Q. What sort of a load did you have; what kind of material were you hauling?

A. I don't know, general freight.

Q. Now, as you went up the rise, did your speed vary at all?

A. Up the last incline?

Q. Yes.

A. From on the level, yes, it came down the hill and then hit the rise.

Q. That's right, so going down the slight rise you would go down faster than you would go up the grade?

A. That's right.

Q. And when you got to the bottom of the other grade, the other vehicle was on top of it?

A. That's right.

Q. And then you slowed down as you pulled up the grade?

A. A little, yes, it's just a slight incline. [139]

Q. Then while the other truck was going down the grade, you would be coming up the other side?

(Testimony of Larry Curtis Woodworth.)

A. That's right.

Q. Did you shift down any?

A. Maybe dropped a third of a gear.

Q. A third of a gear, you have a brownie on that truck?

A. Yes.

Q. And what were you driving in?

A. I was in—I don't recall—we had a different truck every trip, probably in fourth direct.

Q. Well, do you have that from recollection or are you guessing now?

A. I am guessing.

Q. I see, all right.

A. To this point, that from the speedograph report we can pretty well tell what it was.

Q. Well, actually had you had any experience with that truck that you know of?

A. I couldn't say that I had. I had probably used it off and on several times. We had a live one every trip.

Q. Now, this speedograph, you don't know how accurate this particular speedograph was, do you?

A. No.

Q. And the speedographs do vary, don't they?

A. They can. [140]

Q. And so you don't claim anything for the speedograph except that that was the speed of the graph in the truck at the time?

A. That's right.

Q. Now, at the time you were employed, you say, by West Coast Fast Freight?

A. West Coast Fast Freight.

(Testimony of Larry Curtis Woodworth.)

Q. And West Coast Fast Freight was then a division of Pacific Intermountain, wasn't it?

A. I don't know whether they had been taken over at that time or not, the name was still West Coast Fast Freight, and we received our pay checks as such.

Q. Yes, but you actually, your truck was owned and operated through Pacific Intermountain at that time, wasn't it? A. I could not say.

Q. May I see the speedograph card, please? Did you have chains on, by the way? A. No, sir.

Q. Did you stop on top of the hill?

A. No.

Q. And you say you had been following this truck coming up the grade, up the Willamette Pass?

A. Yes. Whether it was this one or not, I don't know. There is a lot of turns in that road that you would lose sight of it.

Q. I see. So it might have been another truck that you were [141] following?

A. That's possible.

Q. So if it turned out that this truck in question stopped at the top of the grade and took his chains off, would you say that it was still the truck you had been following?

A. Would you say that again?

Q. If the evidence would show that the truck involved in the collision had stopped at the top of the grade to take its chains off, then would you say that was the one that you had been following?

A. I am not quite clear on your question yet.

(Testimony of Larry Curtis Woodworth.)

Q. Well, all right, suppose that the evidence discloses or will disclose that the truck which was involved in the collision, that is the Converse rig—

A. Uh huh.

Q. —had stopped at the top of the Willamette Pass, had taken its chains off, then would you say that was the truck you had been following?

A. If he had of stopped, I would have caught him.

Q. But you didn't, did you?

A. That's right, there was no truck at the top when I got there.

Q. Did you—if that truck had stopped at the top of the grade, if it had stopped for ten minutes, would you have caught up with it? [142]

A. That's right.

Q. And actually, doesn't this speedograph indicate that you were going somewhat less than forty miles an hour for quite a long time before the accident?

A. Way back pulling the mountain, yes.

Q. Well, no, may I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Vergeer): You have marked on the exhibit, "Crescent Lake Junction, help at wreck"? A. That's right.

Q. Does that cover a period of time when you were stopped at the wreck? A. Yes.

Q. All right. Now, then, the speedograph card indicates your speed just prior to the time between

(Testimony of Larry Curtis Woodworth.)

then and Eugene, just prior to the time you reached the accident, doesn't it? A. Right.

Q. And it also shows that when you pulled up the grade it took you a little over a half an hour to pull up that grade? A. Yes.

Q. When you were pulling that grade, you were going, oh, maybe ten, fifteen miles an hour a great deal of the time? A. Correct.

Q. Then just before you reached the scene of the accident where it shows your truck came to a stop, the top indication [143] of speed on this thing shows materially under fifty miles an hour, anyway, doesn't it, between twenty-five—somewhere around in there?

A. I have to look at it under a glass. There is one marked there at fifty.

Q. There is one. You reached fifty miles an hour, that's right, momentarily. A. Yes.

Q. And could that have been coming down the ridge?

A. I think that's just this last knoll before the accident.

Q. Then it drops down to about thirty-five?

A. Well, that's after the accident occurred, I started slowing down.

Q. No, you speeded up after that again?

A. Well, I don't know.

Q. You dropped down to about thirty-five and then you held it a little bit and then you picked up to about forty-three?

A. I couldn't tell without looking at it.

(Testimony of Larry Curtis Woodworth.)

Q. You couldn't? A. No.

Q. Well, in any case, this chart shows what you did? A. That's right.

Q. And as to its accuracy, you don't know whether it's 10 per cent off or not?

A. I couldn't say whether it was off or not. [144]

Q. It is not unusual for them to be off, is it?

A. We accept them in the company, and you are allowed certain rules to run with, and we run exclusively by speedograph.

Q. But you do know, it isn't unusual for them to be off to some extent?

A. To vary somewhat?

Q. Yes. And you didn't actually see the accident. Now, may I have——

A. I did see the accident.

Q. Well, I mean, you couldn't tell what happened? A. No, but I mean, I saw the impact.

Q. You could see an accident happening down there? A. Yes, that's right; I saw it.

Q. I wonder if I might—you reached the scene of the accident then shortly after it occurred then, didn't you? A. Yes, directly after that.

Q. And did you see the diagram the police officer drew? A. I did.

Q. Did that correctly show the position of the vehicles before they were moved?

A. That's correct.

Q. Now, I want to hand you, through the courtesy of the bailiff, Exhibit No. 23-G.

(Testimony of Larry Curtis Woodworth.)

Mr. Gearin: Which one is that?

Mr. Vergeer: It's the picture showing the P.I.E. truck [145] front; 23-G, and ask you if the skid-marks that show deeply gouged across way of the highway from the left to the right were there when you reached the scene of the accident or whether you recall looking at them?

A. I don't recognize these marks.

Q. (By Mr. Vergeer): You don't recall whether they were there or not?

A. No, I don't.

Q. Had that truck been moved when the picture was taken?

A. The tanker?

Q. Yes.

A. To the best of my knowledge, I don't believe it had.

Q. It looked just the same to you?

A. That's right.

Mr. Vergeer: That's all.

Redirect Examination

By Mr. Gearin:

Q. What type of rig did you have, Mr. Woodworth?

A. A semitruck and trailer.

Q. All right. And that's—you had a tractor and one trailer?

A. 40-foot box, yes.

Q. Now, as you started down on the last slope toward the accident scene, was the truck ahead of you, the one that was involved in the collision, was that going fast or slower than you were?

(Testimony of Larry Curtis Woodworth.)

A. I would say it was going approximately the same speed [146] I was.

Mr. Gearin: I see. I have no further questions.

Mr. Vergeer: That's all.

(Witness excused.)

Mr. Gearin: Mr. Clancy. [147]

SHERMAN E. CLANCY

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Clancy, where do you live?

A. 5114 Northeast Hoyt.

Q. And how long have you lived in this area?

A. I have lived there at that place about sixteen years.

Q. With whom are you employed at the present time? A. Interstate Freight Line.

Q. By whom were you employed last March 7th?

A. Pacific Intermountain Express.

Q. All right, sir. Now, were you driving a P.I.E. tanker truck and trailer that was involved in this accident? A. Yes.

Q. Where did you start your run?

A. I started my run from Portland to Klamath Falls.

Q. And what day was that?

(Testimony of Sherman E. Clancy.)

A. That was March the 6th.

Q. And from Klamath Falls, did you take another rig back?

A. Yes, I brought the same one back.

Q. I see. And did you stay over and get your required sleep? A. Yes.

Q. All right. Now, as you approached the scene of the [148] accident, what speed were you traveling?

A. I was traveling about thirty-two miles an hour.

Q. I see. And you have had occasion to check your speedograph here today?

A. Yes, uh huh.

Q. And what, if anything, did you do in regard to the speedograph with reference to Officer Hazelwood? A. What did I do?

Q. Yes.

A. Well, he asked me how fast I was going, and I said I don't know, and so then he said, "Well, we will open up the clock and look," which he did.

Q. And what, if anything, did he do with the speedograph?

A. He signed it. He put his name down and the time and the date.

Q. I see. Now, had you seen the Converse rig, Mr. Noteboom's rig, prior to the time that you got close to the accident's scene? A. Yes.

Q. All right. Could you give us any idea of the speed at which he was traveling as he approached the accident's scene?

(Testimony of Sherman E. Clancy.)

A. Well, I would say roughly around forty-five miles an hour.

Q. I see. And will you tell us in your own words then, just exactly what happened as the two vehicles approached [149] each other?

A. Well, I saw him when he came over the hill or this grade; he came over this——

Q. How far would that be away?

A. Oh, I would have to say approximately a half mile; I am not sure on my distance, but——

Q. At that time, on which side of the road were you traveling?

A. I was on the right side.

Q. At any time did your vehicle, or any portion thereof, get on the wrong portion of the road?

A. No.

Q. Perhaps I have interrupted you. Will you, in your own words, describe what happened as the two vehicles approached each other?

A. Well, he was—as this Converse was coming towards me, I was over as far to the right as it was possible for me to get, and I was crowded right up to the snowbank and in order, as he come close, in order for me to avoid hitting him, or him hitting me, I turned to the right as far as I could.

Q. All right. Now, how far apart were the two vehicles when you turned to the right?

A. Well, I would say from about 75 feet—50 to 75 feet.

Q. All right, and then what transpired after that?

A. Well, then there was this crash.

(Testimony of Sherman E. Clancy.)

Q. Were you able to get the front end of your rig over to the right without impact? [150]

A. The front end without impact?

Q. Yes. A. Yes.

Q. All right. Now, at the time that you started to turn to the right, where was the Converse or Mr. Noteboom's rig with reference to the center of the highway?

A. Well, he was on over towards my side.

Q. All right. Now, after you observed that and you started to turn to the right, did you watch what happened to his rig after that?

A. No. No, I didn't, you mean just at the time of the accident?

Q. Well, just before and the last when you turned to the right in the snowbank?

A. The tractor was by me.

Q. I see.

A. And I didn't notice then.

Q. Now, after the accident, were the vehicles in about the approximate position that the police officers have placed them there?

A. Well, yes, No. 3 was a little bit back, angled.

Q. Would you turn that around so the jury can see it to show what you mean?

A. Well, I don't know. I don't mean to change it.

Q. Well, give us your best idea of the way you now remember [151] it looked to you.

A. Well, this tractor here (indicating) was more over on this angle (indicating).

(Testimony of Sherman E. Clancy.)

Q. I see, and then——

A. And this (indicating) was blocking the highway this way, this was back this way (indicating).

Q. More of a "U" shape?

A. More of a "U" shape to it, yes.

Q. All right, sir, and were the distances between the two vehicles about the same?

A. You mean across here (indicating)?

Q. No, lengthwise, north and south on the road, or east and west, I think they have a distance there of 127 feet?

A. Yes, uh huh.

Q. All right. If you will resume the stand, please, Mr. Clancy. Now, Mr. Clancy, what portion of the Converse rig or Mr. Noteboom's rig come into contact with what portion of either your truck or your trailers?

A. Well, it would be the left side.

Q. I see. Of which portion of the rig?

A. Of the Converse, well, the left side of the tractor.

Q. Came in contact with what portion of your rig?

A. With the left rear tank and driver.

Q. Was your trailer damaged at all?

A. Yes, it was. [152]

Q. Whereabouts?

A. I think that the air line was broken, there was an air line broke and the lights and things like that was damaged on it.

Q. I mean, was there any physical contact between any of the Converse or the Noteboom rig?

(Testimony of Sherman E. Clancy.)

A. No.

Q. And your trailer? A. No.

Q. At the time of the accident, at the time of impact, where was your truck with reference to the center of the highway?

A. I was on the right-hand side.

Q. How long did you stay at the scene of the accident after it occurred?

A. I was there from 1:30 in the morning until I believe it was 12:00 noon.

Q. I see. What was the weather out there at the time of the accident? A. Cold.

Q. All right. When you say it was cold, was it below freezing?

A. It was below freezing, yes.

Q. What was the condition of the surface of the highway with regard to whether or not it was slippery?

A. It was—well, it was not like a dry snow, it was—of course, it all depends, I would guess, on how fast you were [153] driving.

Q. Did you have chains on. A. No.

Q. How long a period of time had you been driving with snow on the highway?

A. You mean on this—

Q. Yes.

A. Oh, I don't know, you mean this particular time?

Q. Yes, do you have any memory on that?

A. Well, I don't know just what you mean.

(Testimony of Sherman E. Clancy.)

Q. Well, before the accident, how long in miles or time was it that there had been snow on the highway?

A. Well, it was icy at Klamath Falls and then as I got up, I believe it was—I would have to say south of Chemult.

Q. Did you at any time feel it necessary to put on your chains? A. No.

Mr. Vergeer: I think I object to that.

Mr. Gearin: Well, you may inquire.

Cross-Examination

By Mr. Vergeer:

Q. Mr. Clancy, at the time of the accident, then, I take it—by the way, was your truck loaded or empty? A. I was empty.

Q. And you had been—you took a load to Klamath Falls and dumped it there and came back empty; is that it? [154]

A. That's right.

Q. All right. Now, at the time of the accident, I take it then you had turned to your right before the accident occurred? A. Yes.

Q. And was your truck in a straight line when the accident occurred? A. Yes.

Q. In a straight line? A. You mean——

Q. But somewhat to the right?

A. That's right.

Mr. Vergeer: I think that's all.

Mr. Gearin: That's all, Mr. Clancy.

The Court: Call your next witness.

(Witness excused.)

Mr. Gearin: Your Honor, I don't have any more testimony at this time. I relied on counsel's statement that we would go into the afternoon. I have one more witness.

The Court: You told me that you would be over in the middle of the afternoon, and he said it would be tomorrow, and I said that it would not be. You have been trying cases for many years over here, and you know I don't believe what counsel says.

Mr. Gearin: I have made arrangements, your Honor, for Mr. Ogden of Consolidated Freightways to be here at 3:30 this [155] afternoon, and I called him and told him that it would be tomorrow morning. If your Honor wants me to rest, I have nothing more to give, except ask for a postponement.

The Court: How long will he take?

Mr. Gearin: He will take about two or three minutes, and the purpose of his testimony has to do with the availability of other trucks for rental during this period.

The Court: Well, I will let you do it.

Mr. Gearin: Thank you, sir. I could have had him here.

The Court: Then do it after this.

Mr. Vergeer: If it doesn't make any difference, your Honor, I want to put Mr. Noteboom on again for one question.

The Court: All right, you may do that after he puts on his witness. Recess until tomorrow morning.

(Whereupon, court was adjourned until 11:20 of the following day.) [156]

Thursday, March 21, 1957, 11:20 A.M.

The Court: I didn't realize that we'd be so busy this morning, but I do want to tell you that earlier today we streamlined the issues, and I think we are going to be through about noontime. Call your witness.

Mr. Gearin: Mr. Ogden, please. [157]

E. B. OGDEN

was thereupon produced as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ogden, do you live here in Portland?

A. I do.

Q. What is your occupation, sir?

A. I am vice-president in charge of equipment and development for Consolidated Freightways.

Q. How long have you been in the trucking business?

A. About twenty-five years.

Q. Does Consolidated Freightways operate trucks and trailers upon the highways?

A. They do.

Q. All right. Will you tell us, please, what a set of doubles is?

A. A set of doubles, sir, is a combination of a semitrailer which is pulled by a tractor and behind

(Testimony of E. B. Ogden.)

the first semitrailer is another trailer, a semitrailer which has a removal set of front wheels or a dolly.

Q. In the case of a set of doubles, what is the motive power, what do you call that?

A. A tractor.

Q. All right. Does Consolidated Freightways operate doubles [158] or trains upon the highway?

A. They do.

Q. About how many motive units does Consolidated operate?

A. Close to 500 power units and about 1,800 trailers.

Q. Now, with reference to the power units or tractors for a set of doubles, are those available for rent or lease in the area, say, contiguous to Portland, Oregon?

A. They are.

Q. What is the fact with reference to their availability, say, from the spring of 1956?

A. I would assume that they were available then, too.

Q. All right, sir.

Mr. Vergeer: I will move——

The Court: What do you mean, "I assume"?

The Witness: Well, I would say, yes, they would have been.

Q. (By Mr. Gearin): Is there a standard or what is the rental value, if you know, of a tractor capable and suitable for pulling a set of doubles upon the highway, and what was it with reference, say, to 1956?

A. Well, we have a leasing company and if we

(Testimony of E. B. Ogden.)

were to rent a tractor to pull a set of doubles, our rate would be approximately \$89 a week plus 13c a mile.

Q. The cost of operation and maintenance would be borne by whom?

A. By us as the lessor. [159]

Q. The question of fuel?

A. Fuel would be borne by whoever leased it from us.

Q. I see. And driver's wages?

A. By whoever leased it from us.

Q. I see. Now, the reference has been made about Freightliner; what is a Freightliner Corporation, what do they do?

A. What is the Freightliner Corporation?

Q. Yes.

A. They are a company engaged in building of tractors and/or trucks in the City of Portland.

Q. All right. They are built here in the City of Portland?

A. Yes, sir.

Q. What connection, if any, is there between Freightliner Corporation and Consolidated Truck Freightways?

A. They were a wholly owned subsidiary of Consolidated Freightways.

Q. And were the Freightliner parts available in the City of Portland in the spring of 1956?

A. Yes, sir.

Q. Does that include cabs? A. Yes, sir.

Q. I have no further questions. Oh, one other

(Testimony of E. B. Ogden.)

question. Does this model that we have here, this morning, fairly depict what a set of doubles is?

A. I would say so, yes, sir. [160]

Q. All right. And this (indicating) being the first unit, being the tractor, and the one trailer and the second trailer?

A. Yes, sir.

Mr. Gearin: That's all.

Cross-Examination

By Mr. Vergeer:

Q. Let's see, Mr. Gearin represents Consolidated, doesn't he?

A. I couldn't answer that, sir.

Q. You couldn't?

A. No, sir, I never met the man until this morning. I didn't even know him.

Q. Isn't it a fact that he has represented Consolidated in many cases?

A. I can't answer that. I don't know.

Q. You have not gone to court with reference to Consolidated work?

A. I have been in the past, years ago.

Q. Years ago. Now, Mr. Ogden, you said something about Freightliner equipment being available in Portland?

A. Yes.

Q. Is that the same as an International tractor?

A. Well, it's not the same make, no, sir.

Q. It's not, is it?

A. It's not the same as International. It's a Freightliner.

Q. That's right. There is a difference. Now,

(Testimony of E. B. Ogden.)

how about— [161] was there an International cab available in the City of Portland or anywhere else, for that matter, in March of 1956?

A. I couldn't answer that question.

Q. Isn't it a fact that the International people are now out of business?

A. International Harvester out of business?

Q. Do they make International tractors at this time?

A. Well, yes, International Harvester makes tractors, if that's what you are referring to.

Q. But do they make a tractor without a sleeper?

A. Yes.

Q. Are you sure they still make that?

A. Am I sure they are still making them?

Q. Yes.

A. No, I will have to say that I would assume that International is making them without a sleeper.

Q. You don't know?

A. No, sir, not International.

Q. Now, on this rental business, you say you would charge for a 200 horsepower diesel tractor suitable for this kind of work, you say you would charge \$89 per week plus 13c per mile and the person who rents the equipment would pay the driver; would pay for the fuel and the ordinary operating maintenance?

A. No, we would stand the maintenance.

Q. This is repairs to the truck that you would take care of? [162]

A. That's right.

Q. But you wouldn't—what I am getting at is

(Testimony of E. B. Ogden.)

greasing and all that sort of thing is being done by the renter, isn't that right?

A. No, we would take care of all maintenance.

Q. All maintenance? A. For that price.

Q. The fuel and lubricants only are supplied; is that right?

A. It would include motor oil also and the grease for the chassis, but it would not include the fuel burnt by the engine.

Q. All right, fine. Now, how about insurance and Public Utility Commission plates?

A. It would include insurance but not Public Utility Commission plates. It would include an Oregon license.

Q. What kind of insurance would it include?

A. I am not quite positive what the insurance would cover. My job is not the leasing of trucks. I am in the development of trucks. We have a man whose sole duty is leasing trucks, and when you ask me the insurance, I am not positive.

Q. You don't know about that? A. No.

Mr. Vergeer: Thank you, Mr. Ogden. I think that's all.

Mr. Gearin: Thank you, sir.

The Court: That's all.

(Witness excused.) [163]

Mr. Gearin: I would like to offer into evidence the tachographs and all the photographs, the map which is our Exhibit No. 24, photograph being Exhibits 23-A to L, inclusive, tachograph card Exhibits 26-A and B, and Exhibit 27 and Exhibit 28, the tractor service report.

The Court: Tractor service report?

Mr. Gearin: Yes, sir.

The Court: What is that?

Mr. Gearin: Well, Mr. Crookham asked me for it during the deposition, your Honor, and I just thought I'd offer it.

The Court: I don't think that any of this is material since our discussions of this morning. I thought we were going to submit the case on one specification?

Mr. Gearin: Well, the photographs would be—might be of assistance and the map.

The Court: Photographs, what would they show, who is on the wrong side of the road?

Mr. Gearin: They are just for the assistance of the jury, your Honor.

The Court: Well, I don't care, the photographs are admitted, but not the tachographs.

Mr. Gearin: Well, your Honor, I would like to use the tachograph of Mr. Woodworth for the purpose of impeachment.

The Court: All right, it's admitted for that purpose.

Mr. Vergeer: And how about the map? No one has seen [164] it and I don't know what is on the map. I don't know how it would be helpful.

The Court: Show it to him.

Mr. Crookham: I have seen it, your Honor, and it shows nothing of the snow or anything. It's just a profile as it would be of the summer.

Mr. Gearin: And it shows the profile up and down.

The Court: Show it to Mr. Vergeer.

Mr. Vergeer: Well, I would invite the Court's attention to the map. I fail to see how it would be the least bit helpful. In fact, it would be hopelessly confusing, and I don't think it's material so I will make an objection on that ground.

The Court: Let me take a look.

(Document handed to the Court.)

Mr. Vergeer: That map will have to be explained, your Honor, the thing is very complicated.

The Court: Objection sustained. It's a little too complicated for me.

Mr. Gearin: We rest, your Honor.

Mr. Vergeer: We will call back Mr. Noteboom for a question, your Honor. [165]

DONALD H. NOTEBOOM

was thereupon recalled on rebuttal as a witness on behalf of the plaintiff, and, having been previously sworn was examined and testified as follows:

Direct Examination

By Mr. Vergeer:

Q. Mr. Noteboom, when you came up the Wilamette grade that night, were there chains on your truck?

A. To the top of the hill, yes.

Q. To the top of the hill? A. Yes.

Q. What did you do at the top of the hill?

A. I stopped and took them off.

Q. And then continued to the scene of the accident? A. Yes.

(Testimony of Donald H. Noteboom.)

Q. Tell me something, there is one other question that I wanted to ask you, and that is about the tracking of the rear wheels of the train.

A. Tracking?

Q. Yes, how they track?

A. Directly in line with the very front wheel of the truck.

Q. They follow all the time, do they?

A. Perfect.

Q. In that respect, are they any different from the rear wheels on a semitrailer? [166]

A. They will track better than what they will on a semitrailer.

Q. And they will track within inches of the front wheels; is that right? A. Yes.

Cross-Examination

By Mr. Gearin:

Q. Mr. Noteboom, when you have a train, once in a while they will jackknife?

A. You just have to know how to drive them, yes.

Q. And you were loaded with crackers, as I understand? A. Yes, sir.

Q. That is a relatively light load?

A. A fairly light load.

Q. And when you have a bend between the tractor and the trailer No. 1, then you have a bend in trailer No. 2, don't you? A. Yes, sir.

Q. And if you're on ice and going downhill at a high rate of speed and you put your brakes

(Testimony of Donald H. Noteboom.)

on, you might have some little waving in the back one of the trailers and you might jackknife?

A. Very seldom.

Q. But it's possible? A. Possible.

Q. And you could be—the tractor could be coming down [167] an icy stretch of highway and the tractor would be over here and the trailers could be over here (indicating), couldn't they?

A. Not if you're driving right, sir.

Q. And if you're not driving right, it would happen? A. It's possible.

Q. How long is that set of doubles of yours, about 60 feet? A. Approximately.

Q. Well, it wouldn't be over that anyway, would it? A. The law says not.

Q. And between, for example, between a truck and a trailer, a full truck and trailer, you have the brakes on the trailer being operated by air hoses between the two? A. Yes, sir.

Q. All right. And if I mention a triple valve, will you know what I am talking about?

A. Yes, sir.

Q. Now if I——

Mr. Vergeer: I object, your Honor, this is not cross-examination. I don't know exactly what counsel is after.

Mr. Gearin: May I make him my witness for this question?

Mr. Vergeer: I thought counsel had closed his case.

The Court: Well, I think you opened up quite a bit of this yourself.

(Testimony of Donald H. Noteboom.)

Mr. Vergeer: Very well. [168]

Q. (By Mr. Gearin): And the braking of the air hose between any one of these units, either on a set of trains, set of doubles or a train or a truck and trailer will have what effect upon the brakes?

A. Well, it would set them up.

Q. I mean right now? A. Yes.

Mr. Gearin: I thank you, sir. I have no further questions.

Mr. Vergeer: That's all. Thank you.

The Court: All right.

(Witness excused.)

The Court: That is your case?

Mr. Vergeer: Yes, your Honor, we will rest.

The Court: How long do you want?

Mr. Vergeer: Well, it might take twenty minutes or so.

The Court: It's 11:30 now. The issues have been very much limited and these men will tell you about it themselves. I don't have to tell you right now. Do you have a copy of this interrogatory?

Mr. Vergeer: I do, sir.

Mr. Gearin: I do, too.

The Court: I think we will be through by 12:30 at the outside, everything, and then you can go out to lunch at the expense of the government rather than yourself, or do you prefer to quit at twelve o'clock? [169]

(No response.)

The Court: Go ahead. Don't talk too long. I am not going to give you any limit. None of these men are long-winded, I know them.

(Whereupon, closing argument was made by Mr. Vergeer.)

Mr. Gearin: If the Court please, as Mr. Vergeer has told you, he gets to argue twice. So I am going to try and argue a short time, but I want you to bear with me, if you will.

One of the questions that was not asked by Mr. Vergeer, or which he did not answer, was why did Mr. Clancy take off for the snowbank. He admits he did it. He said he had to do it. Mr. Noteboom said that when they were 60 or 75 feet away that the oncoming truck turned. He didn't—he stated he turned into the snowbank. The answer to that is very obvious. The reason that Mr. Clancy had to turn into the snowbank was because of this set of doubles with the light load being driven at a speed of forty-three miles an hour on an icy highway was having trouble staying on its side of the road. Now, you will recall Mr. Noteboom testified in substance that if you don't drive them properly you are going to have this (indicating) over here (indicating) and this one here (indicating) and something else, and you remember this was going downhill for Mr. Noteboom and it was uphill for us. [170] The grade was very slight, however.

Now, it didn't track, if it's being properly operated. if it's not it won't track, and I suggest to

you that from all the evidence, considering both of these drivers, that one, all of a sudden, has to turn to the right. There is only one reason for it, instinct of self-preservation. He had to do it.

Now, if that is the case, there can be no question but what Mr. Clancy was free from negligence. That's what we are talking about, what made him turn over. Now, one other thing is important, I mean, we try to cover all the facts and just give you the facts because the people on the jury know what is right and what is wrong as well as the lawyers. One of the things is that the air hose—they testified that if our air hoses were broken or damaged between the rigs, that would set the brakes and immediately. The photographs to which counsel referred and has marked, no one at the scene of the accident identified them, the state police officer, the trained men who were there didn't have any comment at all to make about these particular tracks and, frankly, I don't know what can be drawn from them; what they mean. So I think that we can dispense with that. It appears, however, from the measurements that there are—there was 12—11 feet, 7 inches to the side, and if Mr. Clancy had to take to the snowbank in order to avoid [171] Mr. Noteboom, you certainly couldn't hold him for the fact that his trailer may have swung out, if it did swing out. Certainly that was not his fault, that he had to swing into the snowbank.

Now, the officers who testified, the trained men, some of them have been on the force a considerable

period of time, cannot and did not establish the point of impact. Notwithstanding the officer's testimony of the right rear wheel of the third unit of the train which they said was on the side. Now, that is very significant when you bear in mind Mr. Noteboom's testimony this morning that unless you drive it properly, this thing won't track properly, and it is very significant that the police officers, even with this evidence which does not appear from their notes would not establish the point of impact. Now, I ask you this. If those tracks that they described were made by the right side wheels of the Converse rig, then the accident would have had to occur on their side of the road, and the State Police Officers would have made a determination of that fact, which they did not do, which indicates again that this right rear was back here (indicating). That track had nothing to do with where the front end was when it chased Mr. Clancy into the snowbank.

Now, as far as the witnesses are concerned, there was Mr. Woodworth, he contradicted Mr. Noteboom. He has no axe to grind in this case. He says that there was no truck [172] taking its chain off, and he said that when he came over he was following the same speed behind the rig that was involved in the wreck because he could see the snow flurries of the track of the wheels and that speed, according to the tachometer was forty-three miles an hour. Mr. Noteboom says it's something else again, and so those are all the facts I want you to consider. Mr. Vergeer tries to say that we are

doing the best we can to get out from under. But here we have definite positive proof by the tachograph that Mr. Noteboom was going faster than he said he was going at the time.

Now, Mr. Burton, he was some considerable distance away; he said that, "We were on our side at all times." He said that looking past us he could see the Converse rig approach and that it looked like he was on his side of the road, too. So, as far as what happened at the time, all we know is that he says that we turned to the right, the same as Mr. Noteboom and the same as Mr. Clancy said, which brings us back to the same question that I mentioned, and that is: why was it Mr. Clancy had to take to the shoulder of the road and into the snow-bank? Why was it? You have two apparently capable professional drivers and one is going downhill with the rig that's been described with the light load, the other is coming uphill and one has to turn off. It's very obvious that he had to get out of the way. Now, talking about the preponderance of the evidence, I want to [173] comment briefly upon that, and I am going to turn it in with the question of what really happened. How do we find out what the truth is? I want you to bear this in mind, if you will, please. As far as the plaintiff's are concerned, Mr. Samac and Mr. Noteboom, when they brought him here to Portland to be examined by Dr. Davis made statements; one, that he was unconscious. Dr. Teller at Eugene said he had no history of being unconscious. That the

man was mentally alert. Mr. Noteboom told Dr. Davis that his attorney got him to say that he had headaches right after the accident. Dr. Teller had no history of the headaches. In the nineteen days that he was seen, he didn't complain of it. Then they claim a concussion which Dr. Teller did not find. Now, can't we take what Mr. Noteboom says with a grain of salt? Now, the same thing applies to Mr. Sadoff. He says that he tried to rent another vehicle. Did he bolster that up with any testimony other than his own? We had testimony here that other rigs could be rented. He said, "I couldn't get the parts." It's significant that the three business firms that made bids on this didn't have any question about parts or the replacing of the cab. Mr. Samac tells us first of all that the cost a week or two ago, said it cost \$7,000 to repair. Now, he wants to put a little more gasoline on the bonfire and said, "No, it cost \$8,600 to repair." [174] Can we, perhaps, take his testimony with a little grain of salt? Because we know at Consolidated Freightways that a tractor that would have done the job was available and could be rented, but he didn't rent it. He didn't try to rent another vehicle. They were available. I mentioned another firm Jobitz Truck Rental, did you try there? He says, no, he wanted to get a rig in California, but the price wasn't right. Now, so when we consider the claims that are made as damages, and I think we should view them in the same light as we view their testimony as to how this accident happened. Mr. Vergeer says that Mr.

Clancy dozed. There is no testimony of that at all, but we do have this testimony of Mr. Noteboom when I asked him on cross-examination yesterday, I said, "You looked up and all of a sudden the trailer was there? He said, "Yes." He looked up from what? What was he doing? Was he paying attention? Was he looking to his side of the road or did he make Mr. Clancy duck into the snow-bank?

Now, they make a point at us, and the reason I am talking about their damages is that they have stipulated as to our damages, and we have stipulated to Converse damages and this is—you only get to determine half of this case. You only get to determine what caused the accident. Was it Mr. Noteboom or was it Mr. Clancy or was it an unavoidable accident? You answer those questions, and that's all. [175]

But sometimes, you know, just in case you point your finger at either fellow, remember they pointed their finger to us and said we caused the damages to Mr. Samac's rig. Why didn't he call someone else? I asked Mr. Samac if he didn't have a bid from Rowe Brothers, but did he suggest using Rowe Brothers? First, I asked him if he didn't have a bid from International. He says, "Yes." Did he call International? I asked him if he didn't have a bid from White Motor Company and he said, "Yes." Did he call somebody? No, he didn't. So let's take those claims with a little grain of salt, and let's take also their claims that we were on the wrong side of the road with a little grain of salt. Evidently they don't make any claim that

our tractor was, because we didn't make such a claim because it wasn't damaged and you will have the photographs here. It would be the next to the last one. Bearing in mind that the brakes were set immediately upon the impact, now, there is physical evidence that I don't think any member of this jury can overlook. How can they, in good conscience, say that we caused the accident when the front of our rig was driven into the snowbank in order to avoid Mr. Noteboom. Bearing in mind again, please, that Mr. Noteboom had a light load of crackers. He was going at a speed and we have caught him up on one statement, 47 miles an hour, and for a trained driver, you can tell pretty close how fast you are going with a light load, and with this [176] type of vehicle, it's almost like a snake because you have motion here (indicating) and motion here (indicating) and motion up here (indicating). Bearing in mind it's light, it's downhill and it's icy and he is going at a pretty good clip, did he keep that under control; did he force us over? The answer must be yes.

Now, bearing just a little bit further on the loss of use, he said five or six weeks would be enough, but I couldn't get the parts, and I asked him what parts and he said, "I had to get a cab. I wanted something else that had a sleeper, but I couldn't get it." The man here states that they make those Freightliner trucks right here in Portland. Those cabs were available.

Now, another little thing that you can catch them

up on; Mr. Vergeer said you don't deduct liability insurance for the lease of the rig. Well, when Mr. Sadoff was giving you his figures, he ran off the figures of five hundred and some odd dollars for liability insurance, so you can see that it's not all, we have to dig in and try to catch them up here to determine what really happened and what the damages are.

Bearing in mind that the statements that Mr. Sadoff admitted ran from \$3,800 to \$5,090, and when Mr. Sadoff made his settlement with the insurance companies that are here represented by Mr. Clapperton, he cut off the figures of [177] damages at \$5,700, and he settled with them on that case, then to the \$5,800 the \$1,000 deductible which is \$4,769.47. So, you see, in one case he is getting something from his insurance company and then he comes in trying to get it from us and almost doubles it. Now, I ask, who is putting their best foot forward here, and I am going to ask you again, in determining this one question that you will have a chance to answer, what caused Mr. Clancy to pull off on the side of the road? Determine that by looking at all of the evidence in the case, every little bit of it. See on which side the truth lies. See from your practical experience. Those of you who have driven; those of you who have been on rides; those of you who have seen trucks. Take in every little bit of the evidence that is all in this case, and answer that question, please. What caused Mr. Clancy to turn into the snowbank? There is only one answer. The reason

he did, he had to because if he didn't he would have been the one that would have had the personal injuries, and he would have been the one that would have been hurt, and we ask that you answer the question whether or not Mr. Clancy was negligent in the negative because in all fairness I don't see that he had anything to do with this accident other than he was there, and he was trying to protect his life when he pulled into the snowbank. Thank you.

(Mr. Vergeer made his closing argument.)

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, as counsel has told you, this case arose out of a collision which occurred between a truck operated by Converse Trucking Company and one operated by the Pacific Intermountain Express Company on March 7th, 1956, on Oregon State Highway No. 58 near Crescent Lake Junction, and as the result of this accident various claims were asserted. Some by Converse against the Pacific Intermountain Express Company and by Mr. Noteboom, others by the Pacific Intermountain Express Company against the Converse Trucking Company and these have all been consolidated for trial at one time, and it has been further simplified by stipulations of the attorneys so that only a few questions of fact will be decided by the jury. Other questions, primarily questions of law, will be taken care of by me on the basis of your findings.

Now, you have heard all the evidence and it is now my privilege to instruct you as to the law. Just

remember, that you are not to single out one instruction alone in taking the law, but you must consider it from the instructions as a whole, and as I told you previously, you are to follow my instructions and regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to answer those questions on any other basis than those laid down by my instructions.

Now, this claim is predicated on negligence. [179] Negligence is defined as a doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. It is a requirement of due care. In this case, however, the standard of due care has been determined for us, because there is a statute involved, and wherever there is a statute, that determines the standard of care of a reasonably prudent person.

I think both counsel have told you that the real crux of this problem is who was on the wrong side of the road. Mr. Noteboom and Converse say that the defendant was guilty of negligence. I think, specifically, they say that it failed to keep its truck and trailer on the right half of the highway. The law enacted by the State of Oregon reads as follows: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right. Each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." And

I think it's also true and there is a correlary law to the effect that you're supposed to keep at the extreme edge of your right side.

In this particular case, I am going to ask you to answer a number of interrogatories, and the first interrogatory is, "Was Sherman E. Clancy, the driver of the [180] Pacific Intermountain Express Company's truck and trailer guilty of negligence?" And you will answer that question, depending upon whether you find that he was operating his truck and trailer on the wrong side of the road.

That doesn't mean at the second of impact, because it is admitted that at the moment of impact, a portion of his trailer was on the wrong side of the road and it was necessarily true because the nose of his truck was in the snow. I want to say that there is no question that Sherman Clancy's truck was on the wrong side of the road at the moment of impact because at that point a portion of the trailer had gone over the center line of the highway. But was that condition excusable? There is a rule of law which says that if an operator of a vehicle, without negligence on his part, is faced with a sudden emergency in the operation of his vehicle, he is not expected to exercise that cool and deliberate judgment which subsequent investigation suggests would have been the most prudent course. Therefore, if you find that Mr. Clancy, just before the accident was faced with a sudden emergency and that he turned his truck to the right and into the snowbank which resulted in the trailer going across the center line of the highway and colliding with the truck which

Mr. Noteboom was operating, Mr. Clancy would not be guilty of any negligence, if you find that he was faced with a sudden emergency and that he acted with [181] reasonable care under such stress. This is true, even though subsequent investigation might suggest that he could have avoided the accident had he not engaged in this maneuver.

Of course, his driving his truck into the snowbank with the resultant consequences of having the trailer extend over the center line is excusable, if in fact, the truck of Mr. Noteboom was proceeding in the opposite direction over the center line, that is, on his side of the line. You have heard the evidence, and it will be up to you to determine whether Mr. Clancy was, in fact, negligent at the time and place of the accident. That means immediately before the accident occurred.

The next question is: "Was such negligence the proximate cause of the accident?" Proximate cause is probable cause, it is that cause which in direct sequence without any efficient intervening cause produced the accident and injury. I don't think that will be any problem. If you found that one of these trucks was on its right side of the road and a collision occurred, the driving on the wrong side of the road would be the proximate cause of the accident. I think everybody will concede that. Isn't that true, Mr. Gearin? Well, what is it?

Mr. Gearin: Well, I was confused, your Honor, by that. [182] I think that the test is who was on the wrong side of the road period, is the best way I know of expressing it.

The Court: Then you don't want to know the proximate cause?

Mr. Gearin: No, sir, I don't think so.

The Court: Proximate cause is obvious, it seems to me.

Mr. Vergeer: That's right, your Honor.

The Court: We will cut out proximate cause. It's admitted that if the one party was on the wrong side of the road, and the accident occurred, it was the proximate cause as a matter of law. The third question is, "Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?" There again, you have to determine where Donald Noteboom was immediately prior to the accident. If you find that he was driving down the highway with a portion of his train on the wrong side of the road, then he would be either entirely at fault or, if you found that both trucks were on the wrong side of the road and a collision occurred, then his conduct would have contributed to the accident.

I might say that, with reference to the first question, was Sherman E. Clancy, the driver of the Pacific Intermountain Express Company truck and trailer guilty of negligence, it's up to the defendant Pacific [183] Intermountain Express Company to prove that allegation by a preponderance of the evidence, and the preponderance of the evidence means the greater weight of the evidence. The greater weight of the evidence does not necessarily mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason

of the credibility that you give the witnesses or by reason of other evidence that has been introduced. In this case, therefore, if the evidence on the guilt of Sherman E. Clancy is evenly matched or inclines toward the position asserted by the defendant Pacific Intermountain Express Company, you must answer that interrogatory in the negative. That is, you must answer it "No."

The plaintiff must prove by a preponderance of the evidence that he was negligent in order to answer that question in the affirmative. But that's not true, as far as the interrogatory which reads, "Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?" If the evidence is evenly balanced on that, you would also answer that in the negative, because on that one the defendant would have the burden of proof.

Now, the second set of questions is almost identical to the first set of questions, but it relates to the conduct of the defendant Donald H. Noteboom.

In other words, the second set of questions relates to the claim of the Pacific Intermountain Express Company [184] against the Converse Trucking Company, and the first question is, "Was Donald H. Noteboom, the driver of Converse Trucking Service's truck and trailer, guilty of negligence?" And on this allegation, the Pacific Intermountain Express Company has the burden of proof. And the same rules that I laid down for you in connection with the first set of questions are equally applicable here.

Then the next one is, "Was Sherman E. Clancy guilty of negligence which caused or contributed to

the accident?" On that one, the Converse Trucking Company has the burden of proof. After you have answered those questions, you will come to the question of what damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident, and in assessing damages, you should take into consideration the injuries he sustained and the pain and suffering which he has endured and will in the future endure, if you find that he has and will endure pain and suffering, and you may also take into consideration his medical and hospital bills.

In this case, there was evidence introduced that he incurred \$171 in hospital and medical services, and, therefore, you should allow him such sum as you believe reasonable for medical services, not exceeding the sum of \$171, and he has also made a claim for \$540 which he represents to be the amount of wages he lost as a result of the accident. In determining the amount of damages, you [185] may allow him the amount he lost in wages, not exceeding the sum of \$540, and these two sums are to be allowed in addition to a sum for general damages, and the test of general damages, as I have laid it down for you, is such sum as will adequately compensate him for the pain and suffering that he has endured in the past and will endure in the future.

All of these three sums are to be put in that one blank space. In connection with the claim of Samac, you are instructed that the measure of damages is the difference in the value of this vehicle immediately before and immediately after the accident. The

amount that was actually expended in the repair of the vehicle is some evidence of its value immediately before and immediately after the accident, but it is not the true measure of damages, because you must take these two figures. There is testimony that immediately before the accident the truck was worth \$9,500 and immediately after it was worth \$1,400. So in any event, you may not allow more than \$8,100 damages to the truck itself, although you may believe that it was worth less or that the salvage or value immediately afterward was higher than the \$1,400.

In addition to the damage to the truck itself, there is a claim of loss of use of the truck, and under the laws, one of the compensable items of damages to a truck is the reasonable value of its use during the time that it [186] would reasonably be necessary to repair the same. And that is for you to determine. You will recall that the plaintiff's testimony was that it was valued at \$883 a month, and he claims that a maximum of 120 days or a period of four months which it was laid up in order to be repaired, and so if you find, you are to find the loss of use, but you cannot allow more than \$3,532 on this claim. Of course, here again, you may find that it was actually less.

Now, the direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which a witness testifies, the character of his testimony or by evidence

affecting his character or motive or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tended to indicate whether the witness is worthy of belief. Consider each witness, his intelligence, motive, and demeanor and manner while on the stand, consider also any relation each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony [187] of the witness or between the testimony of the different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may say or hear differently, and innocent misrecollections, particularly as to speed, distance and time, like failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy was the result of an innocent error, which it usually is. If you find that the principals of truth fail to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, that you think it deserves. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified falsely, it will be your

duty to disregard all evidence given you by such witness, unless corroborated by other evidence which you do believe.

Now, you will have with you in the jury room, as I said, this form of verdict. These are interrogatories as well as the exhibits. Please answer each one of these interrogatories, and remember that in order to answer any interrogatory it must be by a unanimous vote. In this court, all verdicts are unanimous and, therefore, to each interrogatory [188] it must be unanimous, and that brings us to the interrogatory relating to damages. The amount of damages may not be effected in any mechanical manner. In other words, it has been known that some juries, in order to have an easy way of figuring damages, asked each of the jurors to set down the amount he or she believes should be allowed in damages. Those are added up to a sum and then divided by twelve, and then the amount is figured that way. But that's against the law, you cannot do it. Discuss the amount of damages among yourselves and arrive at a figure which is mutually satisfactory, but don't do it by agreeing in advance to some mechanical method.

Now, this verdict is to be signed only by the foreman, and, therefore, I want to admonish the foreman, whoever he or she may be, to make sure that the answers represent the unanimous opinion of each of the jurors before it's signed.

Is there anything that I omitted that you think I should give, I will ask Mr. Vergeer?

Mr. Vergeer: Well, I don't believe so, your

Honor; I was wondering about the regular emergency instruction. I wonder whether the Court included the negligence on the part of the person being fixed?

The Court: I don't understand.

Mr. Vergeer: Well, I didn't hear the Court say that.

The Court: I don't understand what you mean. [189]

Mr. Vergeer: Well, what I was getting at, of course, is that the emergency doctrine is only applicable if the person that seeks the use of it did not bring about the circumstances through any act of negligence on his part, and I didn't hear that part of it.

The Court: Well, I didn't say so, and I don't recall having said so.

Mr. Vergeer: I did, if a person is without fault on his part.

The Court: That's right. I recall that. The emergency doctrine is only applicable in case the person who was faced with an emergency is without fault at that particular time. If a person is on the wrong side of the road, for example, and is faced with an emergency, this doctrine of exoneration will not apply to him.

Mr. Vergeer: That's all I have, your Honor.

Mr. Clapperton: May I say a word, your Honor?

The Court: Yes.

Mr. Clapperton: In this case, the evidence is undisputed that there were \$4,600 or \$4,700 paid by insurance companies which I represent.

The Court: Yes.

Mr. Clapperton: And I just ask that you instruct the jury that they should not deduct that amount from any amount of damages they find. [190]

The Court: Well, there was no discussion of that and the jury can disregard that remark, too. I told you how to determine damages. You are not interested in legal liability. I have already told you that I am going to determine what judgment should be rendered, and the fact that the insurance company paid or didn't pay \$4,600 or any other sum is absolutely immaterial to any issue that you are called upon to determine. The fact that they did give \$4,600 wouldn't mean that you should raise or lower it or answer a question yes or no because I am going to take care of that particular problem myself.

Mr. Clapperton: Thank you.

Mr. Vergeer: I would like to make my objections in the absence of the jury, your Honor.

The Court: Yes, I just thought if I had——

Mr. Gearin: No, your Honor, except with regard to our instructions No. 4-c and d, with regard to the item of damages, your Honor overlooked that.

The Court: Tell me what they are.

Mr. Gearin: One, minimization of damages and it has to do with the loss of use in the event of total loss.

The Court: I don't think I have to tell you again that the amount to be awarded for loss of use depends upon the time it would reasonably take to repair the vehicle and the man can't drag his

feet and wait for a year or two [191] or any other period of time more than is reasonably necessary to make the repairs, and if in this case you find that six weeks or two months was an adequate time within which to make repairs, obviously that would be the only period of time during which he would be entitled to loss of use. I am going to deny the other request that you make. All right, if there is no other objections—is there any other objection?

Mr. Gearin: I'd like to make some in the absence of the jury.

The Court: All right.

(In the chambers out of the presence of the jury the following proceedings were had:)

Mr. Gearin: The Pacific Intermountain Express objects to the Court's instructing the jury it was admitted or that there was no question but what our truck was on the wrong side of the road at the time of the accident. Mr. Clancy said he didn't get on the wrong side at any time. The measurements so show that after the accident and after the vehicles came to rest they were some 11 feet, 7 inches from each other, and that makes it——

The Court: Oh, I didn't—I thought you had admitted it and by the very statement of how the accident happened, he nosed the truck into the snowbank which in fact caused the [192] trailer to jackknife and go across the center line.

Mr. Gearin: Well, we are at cross-purposes. I

don't recall any such matter, and I would hate to think that the jury had.

The Court: Well, I am going to tell the jury that you didn't admit it.

Mr. Vergeer: Yes, I would be all for that.

Mr. Gearin: And then Pacific Intermountain excepts to the failure of the Court to grant our request to withdraw from the consideration of the jury the question of loss of use because the Samac didn't rent another vehicle and there was testimony by Mr. Sadoff which said that it was a total wreck afterwards.

The Court: All right, those are rejected. The latter ones on the ground that it was apparent that the truck was not a total wreck, that it was, in fact, repaired, and that it was repaired for less than a new one would have cost.

(The following proceedings were had in open court in the presence of the jury:)

The Court: Ladies and gentlemen, I made one comment upon the evidence which was not intended to be a comment and apparently I was working away here on some instructions, and I didn't hear some of the testimony. I stated to you that I thought it was admitted that at the moment of the accident that the plaintiff Intermountain Express Company [193] truck, or at least a portion of the trailer was on the wrong side of the road. I have been now informed that there is no such admissions and it is the contention that at no time during the accident was any portion of the Pacific

Intermountain Express Company truck on the wrong side of the road, and anything I said to the contrary is to be disregarded by you as to that point.

I think we have taken a little longer than I anticipated, and I suggest that before you start deliberating on this case that you go out to lunch. Swear the bailiff.

(Bailiff was sworn by the Clerk of the Court.)

(Whereupon, the jury retired.) [194]

State of Oregon,
County of Multnomah—ss.

I, William A. Beam, an Official Reporter Pro Tempore of the above-entitled court, do hereby certify that I reported in stenotype the foregoing cause, and that my notes were reduced to typewriting under my direction, and that the foregoing transcript, pages 1 to 194, both inclusive, are a full, true and correct record of all instructions given and matters set forth herein had on the trial of said cause and of the whole thereof.

Witness my hand as Official Reporter Pro Tempore this 23rd day of October, 1957, at Portland, Oregon.

/s/ WILLIAM A. BEAM,
Official Reporter Pro
Tempore.

[Endorsed]: Filed October 25, 1957.

Nos. 15603 - 15604

In the

United States Court of Appeals For the Ninth Circuit

CONVERSE TRUCKING SERVICE, a corporation
and DONALD H. NOTEBOOM, *Appellants*,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a corporation, *Appellee*.

} 15603

SAMACK, INC., a corporation, *Appellant*,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a corporation, *Appellee*.

} 15604

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *District Judge*

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
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SUBJECT INDEX

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. There is before this Court for review, no ruling of the trial court to which an objection was made. Appellants did not object to the entry of judgment based upon the jury's answers to the interrogatories submitted. The first time they raised this question was on a motion for new trial	4
II. The jury's findings that neither driver was negligent were based upon correct instructions given to the trial court with no objection by Appellants. The jury found that none of the parties had sustained the burden of proof	7
CONCLUSION	17

TABLE OF AUTHORITIES

CASES

Cole vs. Fogel, et al., 210 Or 257, 310 P 2d 315 (1957).....	11
Ditter vs. Yellow Cab Company, 221 Fed 2d 894 (7th Cir 1955)	6
Flusk vs. Erie R. Co., 110 F. Supp. 118 (D.C. N.J. 1953)....	9
Forest Products Co. Inc. vs. Dant & Russell, Inc., 117 Or 637, 244 Pac 531 (1926).....	10-11
Halprin vs. Mora, 231 Fed 2d 197 (3rd Cir 1956).....	12
Huling vs. Seccombe, et al. 88 Cal App 238, 263 Pac 362....	16
Ingersoll vs. Mason, 155 F Supp 497 (D.C.W.D. Ark 1957)..	13
Jackson vs. King 223 Fed 2d 714 (5th Cir 1955).....	13-14
King vs. Vets Cab, 179 Kan 379, 295 P 2d 605 (1956).....	16
Lampe vs. Franklin American Trust Co., 339 Mo. 361, 96 S.W. 2d 710, 107 ALR 465 (1936)....	10
Mounger vs. Wells, 30 Fed 2d 521 (5th Cir 1929).....	15

TABLE OF AUTHORITIES—(Cont'd)

	PAGE
McGuire vs. McGuire, 152 Kan 237, 103 P 2d 884 (1940)....	15
Packer vs. Fairmont Creamery Co., et al. 158 Kan 191, 146 P 2d 401 (1944).....	16
Pet Milk Co. vs. Boland, 185 Fed 2d 298 (8th Cir 1950)....	6
Reidy vs. Mynntti, et al., 116 Fed 2d 725 (9th Cir 1940).....	5-6
Schumacher vs. United States, 216 Fed 2d 780 (8th Cir 1954).....	4-5
Skidmore vs. Baltimore & O. R. Co., 167 Fed 2d 54 (2d Cir 1948).....	10
Walker vs. West Coast Fast Freight, Inc., 233 Fed 2d 939 (9th Cir 1956).....	5
Willis vs. Skinner, et al., 89 Kan 145, 130 Pac 673 (1913)....	15

STATUTES

28 USCA § 1291	2
28 USCA § 1332 (a)	2

OTHER AUTHORITIES

Rule 46, Federal Rules of Civil Procedure.....	4
Rule 51, Federal Rules of Civil Procedure.....	5
Rule 58, Federal Rules of Civil Procedure.....	6

Nos. 15603 - 15604

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CONVERSE TRUCKING SERVICE, a corporation
and DONALD H. NOTEBOOM, *Appellants*,

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a corporation, *Appellee*.

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a corporation, *Appellee*.

} 15604

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *District Judge*

JURISDICTION

This is an appeal from judgments of the United States District Court for the District of Oregon entered in two civil actions arising out of the same accident which were consolidated for trial. Plaintiff-Appellant, Converse Trucking Service, is a California corporation; Plaintiff-Appellant, Samack, Inc., is an

Oregon corporation, and Appellee, Pacific Intermountain Express Co., is a Nevada corporation. Donald H. Noteboom, third-party defendant and counterclaimant against Appellee, is a resident of the State of Oregon.

The parties as properly realigned for jurisdictional purposes are as follows:

In No. 15603 Noteboom, a resident of Oregon, and Converse Trucking Service, a California corporation, sought judgment against Appellee, a Nevada corporation. Appellee counterclaimed. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000. (R. 4).

In No. 15604 Samack, Inc., an Oregon corporation, sought judgment against Appellee, Pacific Intermountain Express Co., a Nevada corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000. (R. 4).

The District Court had jurisdiction of these actions under 28 USCA § 1332 (a), and this court has jurisdiction of this appeal under 28 USCA § 1291.

QUESTIONS PRESENTED

(1) Is it prejudicial error to enter judgment based upon answers by the jury to special interrogatories when Appellants did not object to entry of the judg-

ment and claimed no error until interposing a motion for new trial?

(2) Is it prejudicial error to enter judgment for the defendant upon a special finding of the jury that the defendant's driver was not negligent where the trial court instructed the jury, without objection, that it could not find defendant's driver guilty of negligence unless plaintiff sustained its burden of proof with respect to that charge?

SUMMARY OF ARGUMENT

I.

There is before this Court for review no ruling of the trial court to which an objection was made. Appellants did not object to the entry of judgment based upon the jury's answers to the interrogatories submitted. The first time they raised this question was on a motion for new trial.

II.

The jury's findings that neither driver was negligent were based upon correct instructions given to the trial court with no objection by Appellants. The jury found that none of the parties had sustained the burden of proof.

ARGUMENT

I.

There is before this Court for review no ruling of the trial court to which an objection was made. Appellants did not object to the entry of judgment based upon the jury's answers to the interrogatories submitted. The first time they raised this question was on a motion for new trial.

Rule 46 of the Federal Rules of Civil Procedure provides:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Without an objection of some kind, and a ruling thereon, there is nothing before this court.

"* * * It is a well-settled rule that alleged errors not brought to the attention of the trial court will not be considered on appeal. (citations). Designation of the ruling as error in the motion for a new trial does not cure the failure to make timely ob-

jection as this court, generally speaking, will not review the action of the trial court in ruling on a motion for a new trial. (citations).” *Schumacher vs. United States*, 216 Fed 2d 780 (8th Cir 1954).

In the case of *Walker vs. West Coast Fast Freight, Inc.*, 233 Fed 2d 939 (9th Cir 1956), this court rejected Appellants’ assignments alleging that certain instructions of the trial court were erroneous when Appellants’ counsel had made no objection in accordance with Rule 51. This court observed, at page 943:

“However, her attorney failed to raise these objections until the motion for a new trial.”

In the case of *Reidy vs. Myntti, et al.*, 116 Fed 2d 725 (9th Cir 1940), it appeared that plaintiff contended on appeal to this court that the jury had returned an improper verdict based upon the trial court’s instructions. The jury had been instructed that if plaintiff recovered at all she should be awarded interest from a certain date. The jury’s verdict did not include any amount for interest. Plaintiff did not object to the entry of judgment at the time the verdict was returned. This court said at page 731:

“The question of the sufficiency of the jury’s verdict was not raised by plaintiff until the trial court had discharged the jury. *Counsel did not request*

that the jury make the verdict more definite. The judgment of the court is in conformity with the verdict, as rendered. If counsel for plaintiff wished to question the verdict as conforming to the court's instructions, he should have raised that question at the time of its rendition." (Emphasis added)

To the same effect see *Pet Milk Co. vs. Boland*, 185 Fed 2d 298, (8th Cir 1950) at page 302.

In the case of *Ditter vs. Yellow Cab Company*, 221 Fed 2d 894 (7th Cir 1955), defendant did not object to certain instructions until making a motion for new trial. The court held:

"Both of these objections came too late to be considered on this appeal."

The record in this case does not disclose any objection on the part of Appellants to the entry of judgment based upon the jury's answers to the interrogatories. The trial court, upon receiving the verdict, had a duty to enter judgment the same day. (Rule 58, Federal Rules of Civil Procedure).

Appellants find themselves in this court challenging a purported ruling of the trial court to which no timely objection was made. Consequently, they have nothing to support an appeal and the judgment of the trial court must be affirmed.

II.

The jury's findings that neither driver was negligent were based upon correct instructions given to the trial court with no objection by Appellants. The jury found that none of the parties had sustained the burden of proof.

Both parties agreed at the trial that a head-on collision occurred between Appellants' and Appellee's trucks. The trial court instructed the jury without objection:

"I think both counsel have told you that the real crux of this problem is who was on the wrong side of the road." (R. 177)

The court then told the jury that in the first instance Appellants had a burden of proving that Appellee was guilty of negligence by a preponderance of the evidence. (R. 180).

The court then instructed the jury: (the driver of Appellee's truck and trailer was Sherman E. Clancy.)

"In this case, therefore, if the evidence on the guilt of Sherman E. Clancy is evenly matched or inclines toward the position asserted by the defendant Pacific Intermountain Express Company, you must answer that interrogatory in the negative. That is, you must answer it 'No'.

"The plaintiff must prove by a preponderance of the evidence that he was negligent in order to

answer that question in the affirmative. But that's not true, as far as the interrogatory which reads, 'Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?' If the evidence is evenly balanced on that, you would also answer that in the negative, because on that one the defendant would have the burden of proof.

"Now, the second set of questions is almost identical to the first set of questions, but it relates to the conduct of the defendant Donald H. Noteboom.

"In other words, the second set of questions relates to the claim of the Pacific Intermountain Express Company [184] against the Converse Trucking Company, and the first question is, 'Was Donald H. Noteboom, the driver of Converse Trucking Service's truck and trailer, guilty of negligence?' And on this allegation, the Pacific Intermountain Express Company has the burden of proof. And the same rules that I laid down for you in connection with the first set of questions are equally applicable here.

"Then the next one is, 'Was Sherman E. Clancy guilty of negligence which caused or contributed to the accident?' On that one, the Converse Trucking Company has the burden of proof."

It is obvious from the foregoing instructions and the answers to the interrogatories that the jury could not decide which truck was on the wrong side of the road. Under the instructions above set out it was authorized and directed to answer the interrogatories in the manner that it did.

Appellants' own brief answers their contention on this appeal. They state: (page 12 Appellants Br.)

"It might be argued in opposition to this proposition that either or both sides had failed to carry the burden of proof, but we submit that this is simply not the situation. In the present case the jury made affirmative findings that neither driver was negligent. This is not a situation wherein the jury is unable to make an affirmative finding and leaves the answer to the question blank. Had this occurred, then it would have been apparent that one or both sides had failed to carry their respective burdens of proof."

The jury was not advised to leave any answers blank, and was specifically instructed that if it could not decide who had carried the burden of proof, the crucial questions should be answered "no". This it did—faithfully following the court's instructions.

"* * * the rule must be borne in mind that every reasonable intendment must be indulged in to support a verdict; in other words, the two findings must be in irreconcilable conflict before they may be set aside. (citing authorities)" *Flusk vs. Erie R. Co.*, 110 F. Supp. 118 (D.C. N.J. 1953) at page 120.

It has been said that answers to special interrogatories by a jury are superior to the traditional general verdict, because the court and counsel can then

find out what the jury decided. See Judge Frank's opinion in *Skidmore vs. Baltimore & O. R. Co.*, 167 Fed 2d 54 (2d Cir 1948). It is crystal clear that here the jury could not decide who was at fault.

Under the law of Oregon and elsewhere, the jury is compelled to find against the party who fails to sustain the burden of proof imposed upon him. An instructive statement relating to the jury's function in connection with problems of burden of proof appears in *Lampe vs. Franklin American Trust Co.*, 339 Mo. 361; 96 S.W. 2d 710; 107 ALR 465 (1936), where the court said:

"If, as to the truth of essential facts, the evidence of the party having the burden of proof is not accepted by the jury as credible over the evidence to the contrary, he is not entitled to have a verdict. (citing authority). In other words, if the jury cannot make up their minds whether to believe or not to believe that facts essential to a parties' case or affirmative defense are true, then as to such issue they must find for the opposite party. They must not attempt to base a verdict upon what facts may be 'more probable', if they cannot decide what facts are true."

The Oregon Supreme Court has said:

"A special verdict will be construed most strongly against the party upon whom rests the burden of proof, and *a special finding received without*

objection most strongly against the party in whose favor it is found: (citing authorities)”. *Forest Products Co., Inc. vs. Dant & Russell, Inc.*, 117 Or 637; 244 Pac 531 (1926). (emphasis added)

Cole vs. Fogel, et al., 210 Or 257; 310 P 2d 315 (1957), was an equity case which was tried without a jury. The trial court had ruled that neither side had sustained the burden of proof, and that this compelled a finding for the defendant. The Supreme Court of Oregon affirmed with a slight modification not material here, and said:

“Further enumeration of the conflicts would be pointless, as enough has been said to show that this Court, from the cold record, cannot determine which party is telling the truth. The trial court apparently experienced the same difficulty, even with the advantage of seeing and hearing the witnesses.

In his opinion, the late Judge Kimmell said:

“* * * The court has carefully considered the evidence and as a result is of the opinion that neither the plaintiff nor the defendants have sustained the burden of proof incumbent upon them. It follows that both the prayer of the complaint and the prayer of the cross complaint will be denied.’ ”

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In his opinion, the late Judge Kimmell said:

“* * * The court has carefully considered the evidence and as a result is of the opinion that neither the plaintiff nor the defendants have sustained the burden of proof incumbent upon them. It follows that both the prayer of the complaint and the prayer of the cross complaint will be denied.’ ”

A decision almost exactly in point with the instant case is *Halprin vs. Mora*, 231 Fed 2d 197 (3rd Cir 1956), which concerned a head-on collision between two motor vehicles. In answer to special interrogatories the jury answered that neither driver was negligent. Stating the issue presented the court said at page 198:

“* * * First, according to plaintiff, the jury’s conclusion that neither defendant nor third-party defendant was negligent was manifestly unreasonable on any view of the evidence.

“The only eye-witnesses who testified as to the manner in which the collision occurred were the defendant Mora and the third-party defendant Davis. Plaintiff analyzes this testimony and concludes that defendant Mora’s testimony clearly showed that third-party defendant Davis was negligent and that Davis’ version of the accident just as clearly indicates that Mora was negligent. Thus, says plaintiff, no matter who the jury believed, it could not reasonably have found that neither driver had been negligent.”

The court affirmed a judgment for defendants. The court observed: (page 198)

“The district court in denying the motion for a new trial pointed out that in essential aspects the jury could have reconciled Mora’s testimony with Davis’ *and found that the plaintiff had failed to sustain the burden of proof.*” (emphasis added)

Another case closely in point was *Ingersoll vs. Mason*, 155 F Supp 497 (D.C.W.D. Ark. 1957), except that the jury found that both drivers were negligent. From the evidence it appeared that the jury should probably have found one or the other but not both negligent. The plaintiff had made a left turn in front of the defendant. The plaintiff testified that he had turned left successfully and was completely on his left shoulder of the highway, but the on-coming defendant swerved to the right, causing the collision. The defendant testified that plaintiff abruptly turned in front of him. The court said:

“As is usual in cases of this kind, the evidence as to how the accident occurred and as to who was to blame was sharply conflicting, and we are satisfied that the jury’s findings that the accident was proximately caused by the joint and concurrent negligence of plaintiff and of James Mason were amply supported by the evidence.”

See also *Jackson vs. King*, 223 Fed 2d 714 (5th Cir 1955), which was an action against the Collector of Internal Revenue to recover taxes plaintiff claimed were erroneously collected. The issue was whether certain houses sold by the taxpayer had been held for investment so as to be capital assets or, as the Collector contended, were held for sale to customers in the

ordinary course of business so that profits would constitute ordinary income. The trial court submitted interrogatories to the jury inquiring whether the houses had been held as capital assets or for sale to customers. The jury answered that the houses were held for investment and judgment was entered for the taxpayer. The Collector appealed. The Court of Appeals reversed because of improper instructions to the jury saying, in part:

“* * * In importing that the jury should find that the property was held for rental purposes or, in the alternative, that it was held for sale to customers in the ordinary course of business, *the instructions did not make it clear that the jury could choose to make neither finding, and that the defendants should prevail if the evidence was so much in equipoise that the jury was left in doubt.*” (emphasis added)

The above authorities demonstrate that the jury properly followed the trial court's instructions which were given without any objections on the part of Appellant. Based upon the evidence and issues submitted, the answers to the interrogatories were consistent and support the judgment for Appellee.

The cases discussed by Appellants are not in point and do not support their position. Those cases say that answers to special interrogatories on particular facts

can be fatally inconsistent when the jury gives *two different answers to the same question*. Thus in the case of *Mounger vs. Wells*, 30 Fed 2d 521 (5th Cir 1929), the jury found that a business transaction was *both* illegal as constituting a gambling venture and a legitimate transaction. This, of course, is an irreconcilable conflict.

In the case of *Willis vs. Skinner, et al.*, 89 Kan 145; 130 Pac 673 (1913), relied on by Appellants, the plaintiff was injured through the alleged negligence of his employer. The jury returned a general verdict for the plaintiff and, in addition, answered some special interrogatories. The jury said the defendant was negligent in failing to supply sufficient help to the plaintiff and, in answer to another question, said that plaintiff's fellow employee and helper could have prevented the accident. The court held that these findings were fatally inconsistent and could not support a plaintiff's verdict because they found the employer both negligent and not negligent.

In the case of *McGuire vs. McGuire*, 152 Kan 237; 103 P 2d 884 (1940), also relied upon by Appellants, the jury returned a general verdict for the plaintiff and, in answer to special interrogatories, found defendants negligent, and also found that the accident was

unavoidable. The jury had been instructed that if the accident was unavoidable it should find for the defendants. The court correctly held that these answers were fatally irreconcilable with the general verdict because they found negligence and also no negligence on the same facts.

In the case of *Packer vs. Fairmont Creamery Co., et al.* 158 Kan 191, 146 P 2d 401 (1944), the court interpreted answers to special interrogatories to mean that the defendant was negligent but that the proximate cause of the accident was the conduct of the driver of the automobile in which plaintiff was a passenger. The court held that these would not support a verdict for the plaintiff and ordered a new trial.

In the case of *King vs. Vets Cab*, 179 Kan 379, 295 P 2d 605 (1956), the jury returned a general verdict for the plaintiff but, in answer to special interrogatories found that the plaintiff was probably guilty of contributory negligence. Actually, the finding on contributory negligence was ambiguous and it was impossible to tell what the jury thought. The court reversed a judgment for the plaintiff and ordered a new trial saying that the possible finding of contributory negligence was inconsistent with the general verdict for the plaintiff. So, also, in the case of *Huling vs. Seccombe, et al.* 88 Cal App 238; 263 Pac 362, the

court held that findings of the trial court which found the allegations of both the complaint and an answer and counterclaim to be true in a quiet title suit to be fatally inconsistent since both could not, as a matter of law be true.

Each of these cases relied upon by Appellants is clearly distinguishable because the jury, or fact finder, answered the same question both "yes" and "no". This is not true in the instant case where the jury said that neither driver was negligent. We have demonstrated that these findings were warranted based on issues and instructions in the case.

The jury's answers to the interrogatories were consistent and as a matter of law support the judgment for Appellee.

CONCLUSION

Appellants' claim that the trial court erred in entering a judgment for Appellee based upon the jury's answers to the interrogatories is not before this court for review since Appellants did not object to the entry of judgment until making their motion for a new trial. Such an objection was too late and presents no question for decision by this court.

The answers to the interrogatories were not inconsistent based upon the issues and the instructions. The

jury was instructed without objection that if neither party proved by preponderance of the evidence that the other was negligent that it should find neither negligent. The jury followed these instructions in answering the interrogatories and the judgment based thereon in favor of Appellee was correct and proper.

The trial court must be affirmed.

Respectfully submitted,

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United States
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for the Ninth Circuit

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BRIEF FOR APPELLANTS

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

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TABLE OF CONTENTS

	Page
Jurisdiction	1
Statement of Case	3
Specification of Error.....	7
Argument of the Case	8
Specification of Error.....	9
Argument	9
Summation	17

TABLE OF AUTHORITIES

Page

CASES

Atkinson v. Dixie-Greyhound Lines (CCA-5 1944), 143 F.2d 477, Cert. Denied 323 U.S. 758, 65 S. Ct. 92, 89 L. Ed. 607.....	9, 16
Austin v. Portland Traction Co. (1947), 181 Or. 470, 182 P.2d 412	8
Ecker v. Potts (CA-DC 1940), 112 F.2d 581, 72 App. D.C. 174	9, 16
Gasoline Products Company v. Champlin Refining Co. (1931), 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188.....	9, 16
Golden Northern Airways v. Tanana Publishing Co. (CA-9 1955), 218 F.2d 612.....	8, 15
Gum v. Wooge (1957), 65 Or. Adv. Sh. 57, 63, — Or. —, 315 P.2d 119.....	8, 11
Huling v. Seccombe (1928), 88 Cal. App. 238, 263 Pac. 362	8, 13
King v. Vets Cab (1956), 179 Kans. 379, 295 P.2d 605	8, 13
LaVigne v. Portland Traction Co. (1946), 179 Or. 221, 170 P.2d 709	8, 11
McGuire v. McGuire (1940), 152 Kans. 237, 103 P.2d 884.....	8, 13
Mounger v. Wells (CCA-5 1929), 30 F.2d 521	8, 15
Packer v. Fairmount Creamery Co. (1944), 158 Kans. 191, 146 P.2d 401.....	8, 13
U. S. v. Calvey (CCA-3 1940), 110 F.2d 327.....	9, 16
Willis v. Skinner (1913), 89 Kans. 145, 130 P. 673	8, 13
Wilson v. Bittner (1929), 129 Or. 122, 276 P.2d 268, 64 A.L.R. 132.....	8, 11

STATUTES

Oregon Revised Statutes 483.302	8, 10
Oregon Revised Statutes 483.306.....	8, 10

NOS. 15603 - 15604

United States
COURT OF APPEALS
for the Ninth Circuit

CONVERSE TRUCKING SERVICE, a Corporation and DONALD H. NOTE- BOOM, vs. PACIFIC INTERMOUNTAIN EXPRESS CO., a Corporation,	}	15603
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HONORABLE GUS J. SOLOMON, Judge

JURISDICTION

This is a combined appeal from companion judgments in two civil actions arising out of the same accident. These actions were commenced in the United States District Court for the District of Oregon by the appellant, Converse Trucking Service, a Corporation (15603) and by Samack, Inc., a Corporation (15604). Donald H.

Noteboom was brought into the first case on motion of the appellee as a third party defendant and sought relief as a counterclaimant. Pacific Intermountain Express Co., sought affirmative relief against Noteboom, Converse Trucking Service, and Samack, Inc., for its property damage.

Converse Trucking Service is a California corporation. Donald H. Noteboom and Samack, Inc., are residents of Oregon, and Pacific Intermountain Express Co., is a Nevada corporation. The amount in controversy, exclusive of interest and costs in each case, exceeds the sum of \$3,000.00.

The District Court had jurisdiction under the provisions of 28 U.S.C.A. Sec. 1332 (a), and the Consolidated Pre-Trial Order (Tr. 3-11, especially Tr. 4).

In addition to the parties above named and by virtue of claimed subrogation rights, the Home Insurance Company, a New York corporation, and the Phoenix Insurance Company, a Connecticut corporation, were joined as parties plaintiff-intervenors in 15604. Neither intervenor has filed notice of appeal.

The cases were consolidated for trial before a jury and a judgment was entered in each case in favor of Pacific Intermountain Express Company by virtue of acceptance of answers to specific interrogatories made by the jury, said judgment orders being entered on the 27th day of March, 1957.

STATEMENT OF THE CASE

Facts

The within several causes of action arise out of a collision which occurred in the State of Oregon on Highway No. 58 near Crescent Lake Junction in the Cascade Mountains on the 7th day of March, 1956. At this time a truck owned by Samack, Inc. and under lease to Converse Trucking Service (hereinafter called Converse), was being operated by an agent and employee of Converse Trucking Service, Donald H. Noteboom, said truck proceeding in a general southeasterly direction enroute from Portland, Oregon, to Klamath Falls, Oregon. The tractor part of the truck assembly, the item owned by Samack, Inc., and leased to Converse, was jointly insured for collision by the intervenors, the Home Insurance Company and the Phoenix Insurance Company (Tr. 4-5).

At the same time a truck owned by Pacific Inter-mountain Express Co. (hereinafter called P.I.E.), was being operated generally northeasterly on the same road enroute from Klamath Falls, Oregon, to Portland, Oregon, and this truck was being driven by Sherman E. Clancy, an agent and employee of P.I.E. (Tr. 4-5, Tr. 149-150).

As a result of the collision between the motor vehicles, the tractor of Samack, Inc. and the trailers owned by Converse Trucking Service sustained some damage, as did the tank truck and trailer owned by P.I.E., which

damage in the last instance was agreed upon as being the sum of \$1,501.52 (Tr. 4-5, 8-9).

In addition to the property damage as herein mentioned Donald H. Noteboom sustained serious personal injuries (Tr. 5).

Intervening plaintiffs, Home Insurance Company and Phoenix Insurance Company, each insured Samack, Inc. for 50% against collision or upset damages in excess of \$1,000.00 to the tractor being operated for Converse Trucking Service. Following said collision each intervening plaintiff loaned Samack, Inc. the sum of \$2,384.73 upon a loan agreement of Samack, Inc. to repay the said sum in the event of recovery against third parties (Tr. 5).

The accident occurred on the 7th day of March, 1956, at about 1:30 A.M. (Tr. 27), on a highway described as the Willamette Pass which traverses the Cascade Mountains in northern Klamath County, Oregon. At that particular point of the impact, the highway was covered with packed snow and bordered by snow banks approximately 23 feet, 8 inches apart (Tr. 58). Both vehicles were eight feet wide (Tr. 59) (Exhibits 3-A, 3-B, 3-C, 3-E, 3-F, Tr. 43-45, Exhibits 23-A to L, inclusive, Tr. 162). The point of impact is located in the middle of a straight stretch of highway which extends for approximately one-half mile and is slightly down-grade for vehicles travelling from Portland to Klamath Falls, the southeasterly direction (Tr. 28, 151).

The Converse rig consisted of a tractor and a set of doubles, or two van-type trailers (Exhibit 3-B) (Tr.

256-26). The Pacific Intermountain equipment consisted of a tank truck and tank trailer (Tr. 149, Exhibit 23-G, Exhibit 3-A), and was being operated without any cargo load (Tr. 155).

Each driver was alone at the time of the occurrence and there were no direct eye witnesses to the actual impact. The P.I.E. truck was being followed by witness Roy Burton, who saw the vehicles approach each other ahead of him and recalled that both vehicles were on their respective right sides of the road (Tr. 96), but after seeing the P.I.E. rig sway slightly, everything went black and he was unable to see the actual impact.

It is of prime importance to note the area of damage on each truck unit. In the case of the Converse equipment, the left front of the cab was badly damaged (Exhibits 3-B, 10-B, Special Jury Finding No. 4, Tr. 14). As can be seen by the picture exhibits, there was additional damage to the trailers, the parts of the equipment actually owned by Converse, and which P.I.E. stipulated was the sum of \$2,026.68 (Tr. 101). No damage was apparent to the front part of the P.I.E. equipment, the damage being limited to the area of the trailer hitch.

It was the contention of each driver that the other crossed the center line, causing the accident. Noteboom, the Converse driver, stated that the passage between the snow banks was wide enough for the two vehicles and he was on the right hand side of the road almost touching the snow bank (Tr. 29). He further stated that the oncoming P.I.E. truck was on its own side and

that both vehicles were travelling about 35 miles per hour (Tr. 30). As the vehicles approached, he is of the opinion that the other vehicle hooked into the snow, or something, and that following this, the back end of the tanker came across and struck the left front of the Converse tractor (Tr. 30-31).

Sherman Clancy, the P.I.E. driver, stated that as the vehicles approached he was travelling approximately 32 miles per hour (Tr. 150) and that the Converse equipment was travelling approximately 45 miles per hour (Tr. 151). He had seen the oncoming vehicle for approximately one-half mile and during this period of time he maintained his tanker on the right side of the highway. His recollection was that as the vehicles were approximately 50 to 75 feet apart, the Converse rig appeared to be coming toward him, that he pulled to the right as far as possible, that the tractor of the Converse equipment passed his cab and the collision occurred (Tr. 151-2).

It will be seen from the instructions that the matters submitted to the jury consisted of the question of negligence on the part of either or both of the drivers, the question of damages personally suffered by Donald H. Noteboom and the damages suffered by Samack, Inc., the lessor of the Converse tractor. The matters concerning the damages sustained by the intervenors, Converse, and P.I.E., were covered either by the Pre-trial Order or stipulation during the course of trial. Judgments were entered in favor of P.I.E. in each case but without allowance of the counterclaim, based upon the answers

to the special interrogatories made by the jury (Tr. 13). Essentially, the jury found that neither driver was guilty of negligence. Because of this peculiar situation, a motion for an order setting aside the judgment and the findings of the jury with respect to the consideration of negligence was made by all of the plaintiff-claimants, which was denied by the trial court.

The appellants contend that the jury could not have found that neither driver was guilty of negligence, as will be shown more fully hereinafter because of the applicable law and the occurrences during the trial. Therefore, in each instance, the appellants respectfully ask that the judgments entered upon the inconsistent and erroneous findings be set aside, and that the appellants have a new trial on the issue of negligence and liability.

SPECIFICATION OF ERROR

The error urged by each of the appellants herein is that the trial court should not have accepted the answers submitted by the jury and should have ordered a new trial as to the question of negligence *because under the circumstances one of the drivers had to be negligent, or else the accident would not and could not have happened*. It should be noted that no re-trial has been asked on the question of damages and it is the position of the appellants that this matter need not be re-tried, being a separate and severable matter from the question of liability and that the damages found by the jury and the stipulation of damages entered into were reasonable and proper under all of the circumstances.

ARGUMENT

Summary of Argument

1. Under the Statutes of the State of Oregon, the substantive law governing the trial, both drivers were charged with the statutory duty of yielding at least one-half of the main traveled portion of the highway in question to the other.

Gum v. Wooge (1957), 65 Or. Adv. Sh. 57, 63,
— Ore. —, 315 P.2d 119;
LaVigne v. Portland Traction Co. (1946), 179
Ore. 221, 170 P.2d 709;
Austin v. Portland Traction Co. (1947), 181 Ore.
470, 182 P.2d 412;
Wilson v. Bittner (1929), 129 Ore. 122, 276 P.2d
268;
ORS 483.302;
ORS 483. 306.

2. Inconsistent special findings by a jury cancel and destroy each other and cannot be the basis for a judgment, but require a new trial.

Golden North Airways v. Tanana Publishing Co.
(CA-9 1955), 218 Fed. 2d 612;
Mounger v. Wells (CCA-5 1929), 30 Fed. 2d 521;
Huling v. Seccombe (1928), 88 Cal. App. 238,
263 Pac. 362;
McGuire v. McGuire (1940), 152 Kans. 237, 103
P.2d 884;
Willis v. Skinner (1913), 89 Kans. 145, 130 P. 673;
Packer v. Fairmount Creamery Co. (1944), 158
Kans. 191, 146 P.2d 401.
King v. Vets Cab (1956), 179 Kans. 379, 295 P.2d
605.

3. Where error requires reversal and a new trial on one severable issue, retrial may be had on that one par-

ticular point without re-trying other issues as to which no error exists.

Gasoline Products Company v. Champlin Co. (1931), 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188;

Atkinson v. Dixie - Greyhound Lines (CCA-5 1944), 143 Fed. 2d 477, Cert. Den. 323 U.S. 758, 65 S. Ct. 92, 89 L. Ed. 607;

Ecker v. Potts (CA-DC 1940), 112 F.2d 581, 72 App. D.C. 174;

U. S. v. Calvey (CCA-3 1940), 110 F.2d 327.

SPECIFICATION OF ERROR

The trial court erred in accepting the special findings and entering judgment thereon and in failing to set aside the judgments and order a new trial upon motion timely made.

ARGUMENT

It has been the contention throughout this matter, that the Answers returned by the jury were inconsistent in two particulars as follows:

"We, the jury, answer the special interrogatories as follows:

1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co. truck and trailer, guilty of negligence?

No.

(b) Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?

No.

2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service truck and trailer, guilty of negligence?

No.

(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident?
No.” (Tr. 13).

The inconsistency of the foregoing is based upon the fact that *one or both* of the drivers had to be negligent for the accident to have occurred.

ORS 483.302 and 483.306 are the applicable statutes. The former provides:

“DUTY TO DRIVE ON RIGHT HALF OF THE HIGHWAY. (1) Upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive on the right half of the highway except when:

“(a) The right half is out of repair and for that reason is impassable; or

“(b) Overtaking and passing another vehicle in accordance with ORS 483.308.

“(2) In driving upon the right half of a highway the driver shall drive as close as practicable to the right-hand edge or curb of the highway except when;

“(a) Overtaking or passing another vehicle;

“(b) Placing a vehicle in position to make a left turn; or

“(c) There are two or more clearly marked lanes allocated exclusively to traffic moving in the direction the vehicle is proceeding.”

ORS 483.306 provides:

“PASSING VEHICLES PROCEEDING IN OPPOSITE DIRECTION. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible.”

The Supreme Court of the State of Oregon in construing the foregoing statutes, has held that strict compliance is not demanded except when vehicles are approaching from opposite directions. In the recent case of *Gum v. Wooge* (1957, 65 Or. Adv. Sh. 57, 63, — Ore. —, 315 P.2d 119, the Court said, in commenting upon the foregoing statutes:

“The requirement of keeping to the right half is not absolute under all circumstances and does not contemplate undeviating compliance except when drivers meet, and pass vehicles coming from the opposite direction. *Austin v. Portland Traction Co.*, 181 Or. 470, 182 P2d 412. Furthermore, the statute is not considered violated in instances when the driver, acting as a reasonably prudent person, turns to the left to avoid a collision with an approaching vehicle traveling in its wrong lane. *La Vigne v. Portland Traction Co.*, 179 Or. 221, 170 P2d 709. Violation of the statutes is negligence per se. *Wilson v. Bittner*, 129 Or. 122, 276 P. 268.”

In the present case, the jury was instructed in effect that they were to pass upon the question of where the point of impact was located in determining which of the drivers was negligent. The jury was also instructed that under the evidence it would not be negligence on the part of Clancey, the P.I.E. driver, to be over the center, if he were confronted with an emergency. The emergency, of course, would be the oncoming Converse truck being itself over the center line (Tr. 152). However, were that the case, then Ncteboom himself would have been guilty of negligence and this jury should have so found.

Reducing it to its simplest terms, the situation is

simply that with 23 feet, 8 inches clearing between the snow banks (Tr. 58, 74) and with trucks of eight foot width (Tr. 59), one or both of the operators had to drive their vehicles across the center line in order for the accident to take place. One of the peculiar circumstances in the present case is that proximate cause was withdrawn from the jury in the following conversation between Court and counsel:

"The Court: Then you don't want to know the proximate cause?

Mr. Gearin: No, sir, I don't think so.

The Court: Proximate cause is obvious, it seems to me.

Mr. Vergeer: That's right, your Honor.

The Court: We will cut out proximate cause. It's admitted that if the one party was on the wrong side of the road, and the accident occurred, it was the proximate cause as a matter of law. . . ."

(Tr. 180)

No exception was taken to the giving of this instruction.

It might be argued in opposition to this proposition that either or both sides had failed to carry the burden of proof, but we submit that this is simply not the situation. In the present case the jury made affirmative findings that neither driver was negligent. This is not a situation wherein the jury is unable to make an affirmative finding and leaves the answer to the question blank. Had this occurred, then it would have been apparent that one or both sides had failed to carry their respective burdens of proof.

Based upon the premise as above outlined that the accident could not physically have occurred had not one of the parties been over the center line immediately prior

to the accident and thus had been negligent per se, the appellants contend that it was thus error for the Trial Court to enter judgment upon such inconsistent findings.

Rule 49 of the Federal Rules of Civil Procedure in subsection (a), provides for the special verdict and interrogatory form as was used in the present case. No complaint is made by the appellants as to submitting special questions to the jury. It is the position of the appellants that the error was committed in accepting the Answers as returned by the verdict.

The general rule that the inconsistent special findings cancel and destroy each other, is supported by the following cases:

Willis v. Skinner (1913), 89 Kans. 145, 130 P. 673;

McGuire v. McGuire (1940), 152 Kans. 237, 103 P.2d 884;

Packer v. Fairmount Creamery Co. (1944), 158 Kans. 191, 146 P.2d 401;

King v. Vets Cab (1956), 179 Kans. 379, 295 P.2d 605;

Huling v. Seccombe (1928), 88 Cal. App. 238, 263 P. 362.

Support for this proposition is found in the case of Packer v. Fairmount Creamery Co., *supra*, which is a case arising out of a factual situation similar to that of the present case. In the Packer case, the collision occurred between two vehicles on a narrow bridge and inconsistent findings were returned by the jury inasmuch as they found against the defendant on the question of failure to apply brakes and then found that the accident

would not have happened if the plaintiff's vehicle had been on the right side of the bridge.

In support of this order requiring a new trial, the Court quoted from the case of *Willis v. Skinner*, *supra*, stating:

“ ‘Consistent special findings control the general verdict when contrary thereto; but when they are inconsistent with one another, some showing a right to a verdict, and others showing contrary, the case is left in the condition of being really undecided, and a new trial should be granted’. (Syl).”

This language has been most recently approved in the case of *King v. Vets Cab*, *supra*.

Another Kansas case cited is that of *McGuire v. McGuire*, *supra*, wherein a verdict for plaintiff, injured when she slipped on rugs in the home of the defendant, was set aside and a new trial granted because of inconsistent special findings. In that particular case the findings determined to have been inconsistent were as follows:

“8. Were the injuries received by the plaintiff, Mrs. Effa H. McGuire, the result of an unavoidable accident? Yes.

“9. Was the defendant Ruth McGuire guilty of negligence which caused the injuries which were received by the plaintiff, Mrs. F. H. McGuire. Yes.”

Following the general rule above noted is *Huling v. Seccombe*, *supra*, a case decided in California by the District Court of Appeals.

The question has not often been raised in the Fed-

eral Courts, but the problem was passed upon squarely in the case of *Mounger v. Wells* (CCA-5 1929), 30 F.2d 521. In this case, a series of special findings were submitted and the Circuit Court held that inasmuch as two of the findings were absolutely in direct opposition to each other, a judgment entered thereupon could not be sustained and a new trial was ordered.

The Court said in its opinion, on page 521:

"It is evident that the answers above set out are irreconcilable. If no actual delivery of cotton was intended to be made, the transaction would be classed as gambling, and recovery could not be had under the law of Texas. On Question No. 2, the contrary result would be reached, for the rules and methods prescribed by the New Orleans Cotton Exchange contemplates actual delivery if the parties did not settle their transactions, otherwise before the delivery date, and the transaction would be legal."

This Court, in the recent case of *Golden Northern Airways v. Tanana Publishing Co.*, 218 F.2d 612, 618, upheld the general rule that special findings control general findings. Such a principle is not applicable as in the present case when two sets of special findings are in conflict. However, in the special concurring opinion, the case of *Mounger v. Wells*, *supra*, was cited by Circuit Judge Pope, wherein he stated:

" Even if some inconsistency could be found between the answers to No. 1 and No. 7, the only result would be to require a new trial, *Mounger v. Wells*, 30 F.2nd 521"

It should be noted that the ultimate decision in the Golden Northern Airways case, *supra*, was decided on other grounds, relating to the question of whether or not a libel was legally proved.

It is apparent in the present case that the questions of damages and the question of liability are entirely severable and are not in any sense overlapping. The damages sustained by Converse Trucking Service and P.I.E. were stipulated (Tr. 9, 101), while the claim of the intervening plaintiffs was not disputed (Tr. 186). This left only the question of actual damages sustained by the lessor of the Converse tractor, Samack, Inc., and the personal injuries sustained by the Converse driver, Donald H. Noteboom. These respective items were proven entirely independently of any question of liability, to which, of course, they were not related.

While it would appear discretionary with the appellate court in reversing as to whether direction should be given to re-try only on certain issues, it would appear that such an order in the present case would serve to expedite a trial and disposal of this matter. The rule is clearly borne out in the following cases:

Gasoline Products Company v. Champlin Co.
(1931), 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188;

Atkinson v. Dixie - Greyhound Lines (CCA-5 1944), 143 F.2d 477, Cert. Den. 323 U.S. 758, 65 S. Ct. 92, 89 L. Ed. 607;

Ecker v. Potts (CA-DC 1940), 112 F.2d 581, 72 App. D.C. 174;

U. S. v. Calvey (CCA-3 1940), 110 F.2d 327.

SUMMATION

Appellants submit that the record herein requires a new trial on the question of liability and urge this Court to issue such a mandate to the trial court.

Respectfully submitted,

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No. 15604

United States
Court of Appeals
for the Ninth Circuit

SAMACK, INC., a Corporation,

Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 22)

FILED

DEC 20 1957

PAUL B. MCGEE, CLERK

Appeal from the United States District Court for the
District of Oregon

No. 15604

**United States
Court of Appeals**
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District of Oregon**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Certificate of Clerk	17
Judgment Order	12
Motion for New Trial	15
Notice of Appeal	16
Order Denying Motion for New Trial	16
Pretrial Order	3
Statement of Points, Appellant's	20
Transcript of Proceedings	23
Instructions to the Jury	176
Witnesses:	
Burton, Roy	
—direct	94, 118
—cross	99
Clancy, Sherman E.	
—direct	149
—cross	155

INDEX	PAGE
Witnesses—(Continued):	
Davis, Dr. Edward W.	
—direct	84
—cross	91
Hazelwood, William	
—direct	72
—cross	79
—redirect	81, 83
—recross	83
Noteboom, Donald H.	
—direct	24, 164
—cross	47, 165
—redirect	51
—recross	52
Ogden, E. B.	
—direct	157
—cross	160
Sadoff, Hyman A.	
—direct	101, 119
—cross	129
—redirect	132
—recross	135
Taylor, Harold L.	
—direct	56
—cross	67
—redirect	71

INDEX**PAGE****Witnesses—(Continued):****Teller, Dr. George (Deposition)**

—direct	103
—cross	109
—redirect	115
—recross	116

Woodworth, Larry Curtis

—direct	137
—cross	141
—redirect	148

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In the United States District Court
for the District of Oregon
Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a
Nevada Corporation,

Defendant.

PRETRIAL ORDER

The above causes came on regularly for pretrial
conference before the Honorable Gus J. Solomon

on Monday, February 25, 1957 (the parties having heretofore stipulated that the causes be consolidated for trial); Converse Trucking Service, Donald H. Noteboom and Samack, Inc., appeared by Charles H. Crookham; the intervening plaintiffs, The Home Insurance Company and Phoenix Insurance Company, appeared by Robert Clapperton and Irving Rand; defendant appeared by John Gordon Gearin.

The parties, with the approval of the Court, agree to the following

Statement of Facts

I.

Converse Trucking Service is a California corporation; Donald H. Noteboom and Samack, Inc., are residents of Oregon; The Home Insurance Company is a New York corporation; Phoenix Insurance Company is a Connecticut corporation; and defendant is a Nevada corporation.

II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

III.

On or about the 7th day of March, 1956, a collision occurred between a tractor and two trailers operated by Converse Trucking Service and a certain truck and trailer owned and operated by Pacific Intermountain Express Co. Said collision occurred on Oregon State Highway No. 58 near the Crescent Lake Junction, as a result of which the above

described motor vehicles received property damage and plaintiff Noteboom, received personal injuries.

IV.

Intervening plaintiff, The Home Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samaek, Inc., against collision or upset for all damages in excess of \$1,000. Intervening plaintiff, Phoenix Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samaek, Inc., against collision or upset for all damages in excess of \$1,000.

Following said collision each intervening plaintiff loaned to Samaek, Inc., the sum of \$2,384.73, with the understanding and agreement that Samaek, Inc., would repay said sums from, and only from, the recovery made by it from the party or parties legally responsible for said damage. As security for the said agreement of repayment plaintiff, Samaek, Inc., pledged to intervening plaintiffs its said claim for said damaged tractor against the defendant.

Contentions of Converse Trucking Service,
Donald H. Noteboom and Samaek, Inc.

I.

That at the time of the occurrence of the accident as aforesaid, the equipment operated by Donald H. Noteboom consisted of a tractor and two trailers; that the tractor operated by Donald H. Noteboom was owned by Samaek, Inc., and was under lease

to and under the exclusive possession and control of Converse Trucking Service, and that Donald H. Noteboom was an agent and employee of the Converse Trucking Service; that the two trailers pulled by the aforesaid tractor were owned by Converse Trucking Service.

II.

That the sole and proximate cause of the collision between the vehicles operated by Donald H. Noteboom and the vehicle of Pacific Intermountain Express Co. was the carelessness, recklessness and negligence of Pacific Intermountain Express Co. in the operation of its vehicle in the following particulars:

a. In operating said vehicle at a high, dangerous and reckless rate of speed under the circumstances then and there existing;

b. In failing to maintain a proper lookout, and especially a lookout for the vehicle operated by Donald H. Noteboom;

c. In failing to yield one-half of the highway to the vehicle operated by Donald H. Noteboom;

d. In failing to drive as close as possible to the right edge of said highway;

e. In failing to have the vehicle under proper or any control.

III.

That as a proximate result of the negligence of Pacific Intermountain Express Co., these parties have been damaged as follows:

1. Converse Trucking Service has been damaged due to the foregoing to the extent of \$2,026.68.

2. Samack, Inc., has been damaged as a result of the foregoing to the extent of \$11,456.37.

3. That Donald H. Noteboom has been damaged as a result of the foregoing by suffering personal injury in that he sustained multiple contusions and abrasions of the body, laceration of the left knee and left elbow, acute sprain of the left ankle, laceration proximal to the metacarpal phalangeal joint between the ring and middle finger on the dorsum of the left hand; a concussion of the head, and required services of physicians and surgeons, and was generally damaged in the sum of Thirty-five Thousand Dollars (\$35,000.00) general damages, and has been unable to work for one month and sustained special damages for loss of wages for one month in the sum of Seven Hundred Fifty Dollars (\$750.00), and has incurred medical and hospital expenses and sustained special damages in the sum of Two Hundred Forty-one and 60/100 Dollars (\$241.60); that the injuries complained of as aforesaid are permanent.

* * *

Pacific Intermountain Express Co. denies the foregoing.

Stipulation as to Intervening Plaintiffs

The parties hereby stipulate that in the event of a verdict or the finding of the Court herein to the effect that Samack, Inc., is entitled to the recovery of any damages for injuries to said tractor that a

judgment in favor of the intervening plaintiffs and against the defendant shall be entered herein to the extent of said damages up to, but not exceeding the sum of \$4,769.46, and that the amount of said judgment in favor of the intervening plaintiffs shall be deducted from the award, if any, so made in favor of Samack, Inc.

Contentions of Pacific Intermountain Express Co.

I.

The accident to which reference has heretofore been made was caused proximately by the negligence of Donald H. Noteboom in the following particulars:

- a. He operated the tractor and two trailers at an excessive rate of speed;
- b. He failed to keep his rig under proper control;
- c. He failed to drive the rig on the right half of the highway;
- d. He failed to maintain proper lookout.

II.

As a proximate result of the foregoing negligence of Donald H. Noteboom, the truck and trailer of defendant were damaged and depreciated in value, and Pacific Intermountain Express Co. lost the use thereof, thereby suffering damage in the sum of \$1,501.52.

The foregoing contentions of Pacific Intermountain Express Co. are denied by Converse Trucking Service, Donald H. Noteboom and Samack, Inc., except they admit the amount of damages sustained by Pacific Intermountain Express Co.

Issues to Be Determined

1. Was defendant guilty of negligence in one or more of the particulars charged, and if so, was such negligence a proximate cause of the accident?

2. Was Donald H. Noteboom guilty of negligence in any particular as charged, and if so, was such negligence a proximate cause of the accident?

3. Was Samack, Inc., at the time and place of the accident legally responsible for the acts and conduct of Donald H. Noteboom?

4. What are the amount of damages sustained by (a) Converse Trucking Service; (b) Samack, Inc., and (c) Donald H. Noteboom, (d) Pacific Intermountain Express Co.?

Exhibits

The following exhibits have been identified, the parties agreeing that further identification is not necessary, but that objection to any of said exhibits shall be made only on the grounds of materiality, relevancy or competency:

I. Exhibits of Converse Trucking Service

- (1) Deposition of Sherman E. Clancy;
- (2) Repair estimate of Fruehauf Trailer Co.;
- (3) Photographs (a) through (), inclusive.

II. Exhibits of Samack, Inc.

- (9) Lease agreement with Converse Trucking Service;
- (10) Photographs (a) through (), inclusive;
- (11) Statement of truck expenses.

* * *

III. Exhibits of Donald H. Noteboom

- (17) Bill of Edward Davis, M.D.;
- (18) Bill of Drs. Rees, Haslinger, Nichols & Bline;
- (19) Deposition of Dr. George W. Teller.

* * *

IV. Exhibits of Pacific Intermountain Express Co.

- (22) Sealed exhibit for impeachment purposes only;
- (23) Photographs (a) through (1), inclusive;
- (24) Map;
- (25) Depositions of Donald H. Noteboom and Hy Sadoff;
- (26) Tachograph cards;
- (27) Driver's log;
- (28) Tractor service report;
- (29) Complaint—Converse Trucking Service vs. Pacific Intermountain Express Co.;
- (30) Complaint—Samack, Inc., vs. Pacific Intermountain Express Co.
- (31) Reserved for medical reports.

V. Exhibits of Home Insurance Company and
Phoenix Insurance Company

(32) Loan receipt of Home Insurance Com-
pany;

(33) Loan receipt of Phoenix Insurance Com-
pany.

It Is Hereby Ordered that the foregoing is the
Pretrial Order in the above-entitled cause, and that
it supersedes the pleadings which are hereby
amended to conform hereto, and that the Pretrial
Order shall not be amended, except by consent or
by Order of the Court to prevent manifest in-
justice.

March 20, 1957.

/s/ GUS J. SOLOMON,
U. S. District Judge.

The Foregoing Form of Pretrial Order Is
Hereby Approved:

/s/ C. S. CROOKHAM,
Of Attorneys for Converse Trucking Service, Sam-
ack, Inc., and Donald H. Noteboom.

/s/ ROBERT CLAPPERTON,
Of Attorneys for Intervening
Plaintiffs.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Pacific In-
termountain Express Co.

Lodged March 11, 1957.

[Endorsed]: Filed March 20, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New
York Corporation, and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned Judge of the above-entitled Court and a jury on Wednesday, March 20, 1957, and continued until Thursday, March 21, 1957. Samack, Inc., appeared by Vergeer & Samuels, its attorneys; The Home Insurance Company and Phoenix Insurance Company appeared by Robert Clapperton, their attorneys and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. A jury was duly empaneled and sworn, following which opening statements were made and evidence on behalf of all parties was in-

troduced. When all parties had rested and arguments to the jury were made, the Court with the consent of all parties submitted special interrogatories in the form of a verdict to the jury, which were answered by the jury as follows:

“We, the jury, answer the special interrogatories as follows:

“1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co. truck and trailer, guilty of negligence?

“No.

“(b) Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?

“No.

“2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service truck and trailer, guilty of negligence?

“No.

“(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident?

“No.

“3. What damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident?

“\$8,711.00.

“4. What damages did Samack, Inc., sustain?

“\$7,529.00.

“Dated this 21st day of March, 1957.

“VICTOR FERGUSON,

“Foreman.”

Said verdict was duly received and based thereon, it is hereby

Ordered that Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company take nothing by their complaints; and

It Is Further Ordered that Pacific Intermountain Express Co. have judgment in its favor against Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company.

Dated this 27th day of March, 1957.

/s/ GUS J. SOLOMON,

Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION

Come now Donald H. Noteboom, Samack, Inc., an Oregon Corporation, The Home Insurance Company, a New York Corporation and Phoenix Insurance Company, a Connecticut Corporation, and Converse Trucking Service, a corporation, and move the Court for an Order setting aside the judgment entered herein, and the findings of the jury with respect to the considerations of negligence submitted to it upon which said judgments are based, upon the following grounds:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the judgment.

IRVING RAND,
ROBERT CLAPPERTON,
VERGEER & SAMUELS,

By /s/ DUANE VERGEER,
Of Attorneys for Converse Trucking Service,
Donald H. Noteboom and Samack, Inc.; The
Home Insurance Company and Phoenix Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

ORDER

The motion of Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company for new trial came on regularly to be heard before the undersigned Judge of the above-entitled Court on the 15th day of April, 1957. The said Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company appeared by Duane Vergeer, of their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. The Court having heard arguments of counsel and being fully advised:

Now Orders that the motion for new trial be, and it is hereby denied.

Dated this 15th day of April, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the District of Oregon; The Home Insurance Company, a New York Corporation, and Phoenix Insurance Company, a Connecticut Corporation, Intervening Plaintiffs; Robert

Clapperton, Their Attorney; Pacific Intermountain Express Co., a Nevada Corporation, Defendant; and John Gordon Gearin, Its Attorney, Greetings:

You and each of you will please take notice that Samack, Inc., an Oregon corporation, the plaintiff in the above-entitled matter, does hereby give notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of the defendant and against the plaintiff, et al.

Dated this 14th day of May, 1957.

VERGEER & SAMUELS,

By /s/ DUANE VERGEER,

Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Judgment order; Order denying motion for a new trial; Notice of appeal; Bond for costs on appeal and

Transcript of docket entries, together with the documents being forwarded in Civil 8508 which is consolidated with this cause, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8834, in which Samack, Inc., an Oregon corporation; The Home Insurance Company, a New York corporation, and Phoenix Insurance Company, a Connecticut corporation, are Plaintiffs; Intervening Plaintiffs and Appellants and Pacific Intermountain Express Co., a Nevada corporation, is the Defendant and Appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 18th day of June, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15604. United States Court of Appeals for the Ninth Circuit. Samack, Inc., a Corporation, Appellant, vs. Pacific Intermountain Express Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 19, 1957.

Docketed June 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 15604

SAMACK, INC., an Oregon Corporation,
Plaintiff-Appellant,

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corporation,
Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,
Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now, Samack, Inc., an Oregon corporation, the Appellant herein, and presents the following as a Statement of Points upon which it intends to rely in its appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the several judgments.

Dated this 24th day of June, 1957.

VERGEER & SAMUELS,

By /s/ C. S. CROOKHAM,

Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1957.

No. 15605

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE L. SCHARPF AND WILLIAM FRED
SCHARPF, EXECUTORS OF THE ESTATE
OF LOUIS C. SCHARPF,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,

HARRY BAUM,

CHARLES B. E. FREEMAN,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

CLARENCE EDWIN LUCKEY,
United States Attorney.

EDWARD J. GEORGEFF,
Assistant United States Attorney.

FILED

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	3
Summary of Argument	8
Argument:	
The District Court correctly held that the second claim for refund filed on February 16, 1951, was not timely under Sections 322(b) and 3772(a), Internal Revenue Code of 1939, and was not a permissible amendment to the original claim filed on March 13, 1948, which did not set forth the ground upon which this suit is based	10
A. The refund claim of March 13, 1948, did not present the ground upon which this suit is based	10
B. The refund claim of February 16, 1951, was untimely and was not a permissible amendment of the original claim	13
C. The Commissioner did not waive the requirements of the Regulations	21
Conclusion	22
Appendix	23

CITATIONS

Page

CASES:

<i>Angelus Milling Co. v. Commissioner</i> , 325 U.S. 293	17, 19, 20
<i>First Nat. Pictures v. United States</i> , 32 F. Supp. 138	14
<i>Mesta v. United States</i> , 137 F. 2d 426	19
<i>Nichols v. United States</i> , 7 Wall. 122	11
<i>Pacific Mills v. Nichols</i> , 72 F. 2d 103	14
<i>Real Estate Title Trust Co. v. United States</i> , 309 U.S. 13	12
<i>Rogan v. Taylor</i> , 136 F. 2d 598	21
<i>Socony-Vacuum Oil Co. v. United States</i> , 146 F. 2d 853	20
<i>Twin Oaks Co. v. Commissioner</i> , 183 F. 2d 385	5, 6, 18
<i>United States v. Andrews</i> , 302 U.S. 517	12, 14, 21
<i>United States v. Felt & Tarrant Co.</i> , 283 U.S. 269	11, 12
<i>United States v. Garbutt Oil Co.</i> , 302 U.S. 528	12, 14, 16, 19, 20, 21
<i>United States v. Henry Prentiss & Co.</i> , 288 U.S. 73	14, 15, 21

STATUTES:

Internal Revenue Code of 1939:	
Sec. 322 (26 U.S.C. 1952 ed., Sec. 322)	2, 8, 10, 11, 13, 14, 21, 23
Sec. 3772 (26 U.S.C. 1952 ed., Sec. 3772)	2, 8, 10, 24
Internal Revenue Code of 1954, Sec. 7422 (26 U.S.C. 1952 ed., Supp. II, Sec. 7422)	24

MISCELLANEOUS:

Treasury Regulations 111:	
Sec. 29.322-3	11, 14, 17, 19, 24
Sec. 29.322-7	25

No. 15605

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE L. SCHARPF AND WILLIAM FRED
SCHARPF, EXECUTORS OF THE ESTATE
OF LOUIS C. SCHARPF,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

OPINION BELOW

The findings of fact and conclusions of law (R. 14-21) and opinion of the District Court (R. 47-54) are not officially reported.

JURISDICTION

This appeal involves federal income taxes for the calendar year 1944. (R. 14.) The tax was paid as reported

on the return in 1945 and the additional assessment was paid on March 8, 1948. (R. 15-16.) Claims for refund were filed on March 13, 1948, and February 16, 1951. (R. 17-18.) These were rejected by the Commissioner on October 19, 1954. (R. 20.) Within the time provided in Section 3772(a)(2), Internal Revenue Code of 1939, this action was brought in the District Court on September 19, 1955, for recovery of a portion of the 1944 tax alleged to have been erroneously assessed and collected. (R. 14-15, 40.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on April 4, 1957. (R. 22.) On May 31, 1957, a notice of appeal was filed. (R. 23.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the second claim for refund filed on February 16, 1951, was not timely under Sections 322(b) and 3772(a), Internal Revenue Code of 1939, and was not a permissible amendment to the original claim filed on March 13, 1948, which did not set forth the ground upon which this suit is based.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations may be found in the Appendix, *infra*.

STATEMENT

The facts as found by the District Court may be summarized as follows (R. 14-20):

This appeal involves federal income taxes for the year 1944 assessed against and collected from Louis C. Scharpf (hereinafter designated taxpayer). (R. 14.)

During the year 1944, taxpayer and his wife Eva M. Scharpf resided in the City of Eugene, County of Lane, State of Oregon. Taxpayer died on May 10, 1952, and George L. Scharpf and William Fred Scharpf, appellants herein, were duly appointed by the Circuit Court of Lane County as the executors of his estate, and they are still acting in that capacity. (R. 15.)

On or about January 25, 1941, taxpayer and his wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement effective January 1, 1941, for the purpose of conducting under the name of Twin Oaks Builders Supply Company, a general building supply business in the City of Eugene, Oregon. During the year 1944, the business of Twin Oaks Builders Supply Company was carried on in accordance with the terms of the partnership agreement. Taxpayer and his wife duly reported their respective incomes therefrom and paid their individual income tax thereon to the Collector of Internal Revenue for the District of Oregon.

The Commissioner notified taxpayer on October 3, 1947, of an income tax deficiency asserted against him for the year 1944 in the amount of \$8,328.06, based upon

the assertion that one half of the income from Twin Oaks Builders Supply Company, during the year 1944, was taxable to him and none to his wife. On the same date, the Commissioner notified Twin Oaks Company, a corporation owned and controlled by the partners of Twin Oaks Builders Supply Company (hereinafter designated the corporation), of deficiencies asserted against it for the years 1942, 1943 and 1944. The Commissioner's determination was based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Company (hereinafter designated the partnership) for each of the years in question was taxable to the corporation rather than to the partners. On December 24, 1947, the corporation filed a petition in the Tax Court of the United States seeking a redetermination of the deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner and the trial took place on June 7 and June 8, 1948. (R. 15-16.)

Taxpayer paid to the Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, pursuant to notice and demand dated February 26, 1948, the sum of \$9,792.31, representing the asserted deficiency of \$8,328.06, plus interest in the amount of \$1,464.25. The payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of the total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948, which stated in part (R. 16-17):

The payment of the deficiency above described and the application of the credit as above set out

are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

On March 13, 1948, taxpayer filed with the Collector of Internal Revenue for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The reason set forth by him for the allowance of the claim was that (R. 17-18):

In a proceeding now pending before the Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944, was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final determination had as to the taxation of the income of this taxpayer.

The decision of the Tax Court of the United States in the case of *Twin Oaks Co. v. Commissioner*, referred to in the claim for refund, was filed on July 18, 1949, in favor of the Commissioner. The corporation appealed the decision and under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued

its opinion in the case (*Twin Oaks Co. v. Commissioner*, 183 F. 2d 385) reversing the decision of the Tax Court, finding that the Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation. (R. 18.)

On February 16, 1951, taxpayer filed a claim for refund in the amount of \$4,138.70 for the year 1944, which purported to be an amendment of the refund claim filed on March 13, 1948. The statement attached to the refund claim was as follows (R. 18-19):

On or about January 25, 1941, I and my wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.25, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300 per year each. The losses of the said business were to be divided equally among the partners.

In entering into said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects

and was entitled to recognition for Federal income tax purposes.

This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less overassessment determined to be due on such ground to Eva M. Scharpf.

Under date of October 15, 1954, appellants as executors of taxpayer's estate received from the District Director of Internal Revenue in Portland, Oregon, "Notice of Adjustment" of taxpayer's income tax liability for the year 1944, in which it was determined that there was an overassessment or overpayment of taxpayer's income tax for that year in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director allowed a refund to appellants of only \$122.55, being the amount of the income tax and interest paid by taxpayer for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, plus interest of \$40.25, was refunded to appellants about October 18, 1954. This action was based upon the Commissioner's determination (1) that the refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of the exact basis therefor, and (2) the refund claim filed on February 16, 1951, although apprising the Commissioner of the exact basis therefor, was not timely and could not be considered as an amendment of the first refund claim. Appellants received statutory notices of disallowance of both the original and the amended refund claims on October 19, 1954. (R. 1920.)

The District Court sustained the Commissioner's disallowance of both claims. It held that the claim filed on March 13, 1948, did not set forth the ground upon which this suit is based; and that the second claim filed on February 16, 1951, was not a timely and proper claim nor was it a permissible amendment to the original claim. In addition, the District Court held that the Commissioner did not waive the requirements of the Regulations. (R. 20-21, 52-54.)

SUMMARY OF ARGUMENT

Section 3772(a)(1), Internal Revenue Code of 1939, provides that no suit for refund shall be maintained unless a claim for refund or credit has been filed with the Commissioner in accordance with the law and the Regulations in that regard. Section 322(b)(1) provides that no refund or credit be allowed unless a claim for refund or credit is filed within three years from filing the return or two years from the time the tax was paid, whichever is later. The implementing Regulations set forth the manner of filing a claim and provide that each claim must detail each ground and sufficient facts to apprise the Commissioner of the exact basis of the claim. The Regulations also provide that no refund or credit will be allowed after the expiration of the statutory period for filing a claim except upon one or more of the grounds set forth in a claim filed prior to the expiration of that period. Thus, no recovery can be had in any suit except upon the grounds stated in a prior claim for refund or credit.

In the instant suit, the original refund claim of March 13, 1948, did not present the ground upon which this suit is based. That claim stated a single specific ground for recovery, namely, that in a proceeding then pending in the Tax Court, the Commissioner had asserted that taxpayer's income derived from the partnership was taxable to the corporation—not to taxpayer. That claim, therefore, restricted recovery to the tax consequences flowing from the culmination of the proceeding in the Tax Court involving the corporation.

The ground upon which this suit is based was stated in the second claim filed on February 16, 1951. The second claim, however, was untimely because it was not filed within three years after the return was filed, which expired on March 15, 1948; nor was it filed within two years after the tax was paid, which expired on March 8, 1950. A claim stating a specific ground may not be amended, after the period of limitation for filing a claim, to seek a refund on an unrelated ground. The original claim here stated the specific ground involving the Commissioner's disregard of the partnership form. The second claim stated the specific ground involving the Commissioner's recognition of the partnership but disallowance of taxpayer's wife as a bona fide partner. The ground of the second claim is unrelated to that of the first claim. Accordingly, since the second claim was untimely and stated an unrelated ground, the second claim was not a permissible amendment of the original claim. In effect it constituted a new claim, in the guise of an amendment to the prior claim.

Taxpayer's contention that the letter of March 6, 1948, should be viewed as the refund claim on which this suit is based is without merit; the letter did not purport to be a refund claim, it was not based on any particular ground as required by the Regulations, and in any event it was superseded by the formal and specific (original) claim of March 13, 1948. Taxpayer's alternative contention that the Commissioner waived the requirement of the Regulations as to the form of the claim is beside the issue; the original and the subsequent claims each set forth specific (but different) grounds, and were otherwise satisfactory as to form, but the later claim was untimely and the Commissioner is powerless to waive the statutory period of limitations. Accordingly, the District Court correctly held that the second claim for refund was not timely under Sections 322(b)(1) and 3772(a)(1), Internal Revenue Code of 1939, and was not a permissible amendment to the original claim which did not set forth the ground upon which this suit is based.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE SECOND CLAIM FOR REFUND FILED ON FEBRUARY 16, 1951, WAS NOT TIMELY UNDER SECTIONS 322(b) AND 3772(a), INTERNAL REVENUE CODE OF 1939, AND WAS NOT A PERMISSIBLE AMENDMENT TO THE ORIGINAL CLAIM FILED ON MARCH 13, 1948, WHICH DID NOT SET FORTH THE GROUND UPON WHICH THIS SUIT IS BASED.

A. The refund claim of March 13, 1948, did not present the ground upon which this suit is based.

Section 3772(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that no suit for refund

shall be maintained unless a claim for refund or credit has been filed with the Commissioner "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof". Section 322(b)(1) (Appendix, *infra*) provides that no refund or credit be allowed unless a claim for refund or credit is filed within three years from filing the return or two years from the time the tax was paid, whichever is later.¹ The implementing Regulations set forth the manner of filing a claim and provide (Treasury Regulations 111, Section 29.322-3 (Appendix, *infra*)):

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

The purposes of the claim requirements prior to a refund suit are to insure the orderly administration of the revenue and afford the Commissioner an opportunity to correct errors made by his office without the necessity of litigation. *United States v. Felt & Tarrant Co.*, 283 U.S. 269, 272; *Nichols v. United States*, 7 Wall. 122, 129-131. Obviously, unless all the grounds relied upon by a taxpayer are presented to the Commissioner, the desired

¹ The applicable statutory provisions are Sections 322(b) of the Internal Revenue Code of 1939 and 7422(a) of the Internal Revenue Code of 1954. The latter section is substantially the same as Section 3772(a)(1) of the 1939 Code, and for convenience we refer (as did the District Court) to the provisions of the 1939 Code.

It is settled that a claim may be amended prior to the expiration of the period of limitations, which in this case is two years after the tax was paid. Section 322 (b)(1); *Pacific Mills v. Nichols*, 72 F. 2d 103 (C.A. 1st); *First Nat. Pictures v. United States*, 32 F. Supp. 138 (C. Cls.); Treasury Regulations 111, Section 29.322-3. This settled principle is not applicable here, however, because the deficiency was paid on March 8, 1948, but the second claim was not filed until February 16, 1951. (R. 16, 18.)

The Supreme Court has stated that a claim limited to a specific ground may not be amended after the period of limitations to seek a refund on an unrelated ground. *United States v. Garbutt Oil Co.*, 302 U.S. 528; *United States v. Andrews*, 302 U.S. 517; *United States v. Henry Prentiss & Co.*, 288 U.S. 73. In the *Andrews* case, taxpayer's original claim set forth a loss due to the worthlessness of stock. The purported amendment filed after the period of limitations alleged as ground for refund that an amount reported as dividend income was not taxable as such but was capital gain resulting from a sale. The Supreme Court disallowed the amendment and stated (p. 524):

Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. *On the other hand, a claim which demands relief upon one*

asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim. [Italics supplied.]

Similarly, in the *Henry Prentiss & Co.* case, taxpayer's original claim set forth its need for a special assessment due to extraordinary conditions in its business. The purported amendment, filed after the expiration of the period of limitations, set forth as a ground for relief the alleged undervaluation of real estate and the exclusion of certain intangibles in computing its invested capital. The Supreme Court disallowed the amendment, stating (p. 85):

A demand for a special assessment in accordance with § 327(d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. * * * It has no relation, for example, to an assessment of tangible property, such as land or buildings, at less than the cash value.

In both the *Andrews* and *Prentiss* cases, the original claim stated a specific ground as the basis for refund. Here, as demonstrated under subheading A, the original claim stated a specific ground as the basis for a refund, namely, that the Commissioner had asserted that the taxpayer's income derived from the partnership was taxable to the corporation—not to taxpayer. (R. 16, 17.) This ground involved the issue of a corporation vis-a-vis a partnership. The ground set forth in the second claim was that a valid partnership existed between taxpayer and his wife and that the Commissioner erroneously refused to recognize the wife as a partner. (R. 18-19.)

Thus, the original claim was grounded upon disregard of the partnership, while the second claim was grounded upon recognition of the partnership. The two claims, and the grounds upon which they are predicated, are quite different and indeed mutually inconsistent. Here, as in *United States v. Garbutt Oil Co.*, *supra*, "the ground asserted in the later demand was totally inconsistent with and involved a negation of that specified in the [original] claim for refund". In the words of the court below (R. 53-54):

This is not a case where an informal or general claim for refund was later amended by a specific claim. This is a case in which, after the statute of limitations had run, an attempt was made to file a new claim under the guise of an amendment to a prior claim, which, although timely filed, never materialized. Under these circumstances, the new claim is barred by the two-year statute of limitations. *United States v. Andrews, Executrix* (1938), 302 U.S. 517; *United States v. Garbutt Oil Co.* (1938), 302 U.S. 528.

There was no action on the part of the Commissioner of Internal Revenue which constituted a waiver, since the Commissioner is powerless to waive the substantive requirements of the statute requiring that the claim be presented within a given period of time. *United States v. Garbutt Oil Co.*, *supra*. The function of the statute, like that of limitations generally, is to give protection against stale demands. *United States v. Memphis Cotton Oil Co.* (1933), 288 U.S. 62, 71.

When the Commissioner included one half of the partnership profits in the taxpayer's income, he notified taxpayer that taxpayer's wife was not recognized as a partner. (R. 15-16.) Nevertheless, when taxpayer filed

the original claim for refund, he did not assert the ground on which the deficiency was based, namely, that the wife was not a bona fide partner. Instead, taxpayer claimed a refund only in the event the Commissioner successfully caused all of the partnership profits to be taxable to the corporation. (R. 17-18.) The Commissioner had a right to assume that taxpayer had abandoned the ground upon which the deficiency was based. In any event, contrary to taxpayer's argument (Br. 14-16), the Commissioner had a right to insist that the grounds for the claimed refund be stated in the claim (Treasury Regulations 111, Section 29.322-3), as the following statement of the Supreme Court demonstrates (*Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296, 297, 299):

The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations. * * *

* * * * *

Treasury Regulations are calculated to avoid dilatory, careless and wasteful fiscal administration by barring incomplete or confusing claims. * * *

The showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim. It is not enough that in some roundabout way the facts supporting the claim may have reached him. The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form

in its submission. We do not think that the petitioner has made out such a case here.

* * * * *

An additional argument of the petitioner need not detain us long. It urges that taking the claims filed by Niagara and petitioner together, they furnish all the data required by the regulations. *But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim.* [Italics supplied.]

Obviously, the Commissioner knew the ground upon which the deficiency against taxpayer was based. Taxpayer refers to documents which were exhibits in the Tax Court in the *Twin Oaks Co. v. Commissioner* proceeding. (Br. 16-18.) Taxpayer's letters dated September 25, 1946, and March 6, 1948 (R. 24-27), antedated the original refund claim which did not state, as a ground for refund, the Commissioner's refusal to recognize taxpayer's wife as a bona fide partner. Instead, the original claim stated as the specific ground for refund the Commissioner's inclusion of the partnership profits in the corporation's income. (R. 17-18.)³ The wife's claim (R.

³ Taxpayer apparently argues that the letter of March 6, 1948, transmitting the deficiency payment and informing the Commissioner generally of his dissent should be considered an informal and general claim for refund. (Br. 10.) As taxpayer seems to concede, however, the original and formal claim for refund of March 13, 1948, superseded the general letter of March 6, 1948, and the formal claim was not vague and general. (Br. 10.)

27-29) does no more than reiterate the basis of the deficiency against taxpayer as do the opening statements (R. 31-36). The Regulations require that *taxpayer's claim* apprise the Commissioner of the exact basis. Treasury Regulations 111, Section 29.322-3. There is nothing in these references which even purports to bring the Commissioner's attention to the fact that taxpayer asserted, as a ground for refund, the Commissioner's refusal to recognize taxpayer's wife as a bona fide partner. The Commissioner had no indication of this latter assertion until the second refund claim of February 16, 1951. Clearly, the Supreme Court's statements quoted above from the *Angelus Milling Co.* case dispose of taxpayer's contention. (Br. 16-18.) See also *United States v. Garbutt Oil Co.*, *supra*.

That a taxpayer mistakenly omits a ground from his refund claim is of no significance even if later it turns out that such ground would have entitled him to a refund. The circumstances here point strongly to such a mistaken omission, however, as the Third Circuit has remarked in the analogous case of *Mesta v. United States*, 137 F. 2d 426, 427, 428:

There is no dispute of fact between the plaintiff and the defendant, the correctness of the amount of the claim is admitted; the sole defense for the Commissioner's refusal to make the refund is the statute of limitations. If the Commissioner is right on his point of law, he is not permitted to waive the requirements however churlish the refusal may seem in view of the now admitted correctness of the taxpayer's refund claim. * * *

* * * * *

The Court, itself composed of taxpayers, feels sympathy with this plaintiff's position. * * *

But the most sympathetic consideration for the taxpayer cannot bring us to the interpretation of the language in her original claim which her resourceful counsel now urges. * * *

Furthermore, the ground stated in the original claim did not require the Commissioner to make a general re-audit of taxpayer's liability. The Commissioner's investigation of the ground stated in the claim had been made prior to the filing of the original claim and resulted in his determination that the partnership profits constituted taxable income to the corporation. Even if a re-audit was made, as apparently there was since an overassessment was determined and adjustment made (R. 19-20), the Commissioner was not required to accept the untimely amendment and permit circumvention of the statute and Regulations. *United States v. Garbutt Oil Co., supra*; *Angelus Milling Co. v. Commissioner, supra*; see *Socony-Vacuum Oil Co. v. United States*, 146 F. 2d 853 (C.A. 2d).⁴

⁴ Taxpayer suggests (Br. 12) that the amount of his original refund claim (\$7134.44) supports an inference that it was grounded upon the family partnership issue, i.e., the Commissioner's non-recognition of his wife as a partner. On the contrary, had the claim been predicated on that ground the amount refundable would have been \$8,328.06 (plus interest), the *deficiency* assessed by reason of the Commissioner's non-recognition of the wife as a partner (R 15-16) rather than the \$7,134.44 tax originally paid on the assumption his wife was a bona fide partner. In any event, even if the amount originally claimed coincided with the amount subsequently claimed, that would furnish no basis for treating the later claim as a timely amendment. See *United States v. Garbutt Oil Co., supra*.

C. The Commissioner did not waive the requirements of the Regulations.

Taxpayer alternatively asserts that the Commissioner waived his Regulations as to the form and content of the claim. (Br. 21-23.) No attempt is made, however, to demonstrate how a waiver occurred. (See Br. 23.) Though the Commissioner may waive the formal requirements of the Regulations (which were here met), he cannot waive the mandate of the statute requiring a timely claim prior to refund or credit. Section 322(b); *United States v. Garbutt Oil Co.*, 302 U.S. 528; *Rogan v. Taylor*, 136 F. 2d 598 (C.A. 9th).

Taxpayer here filed an original and timely claim for refund on a particular ground, in the form required by the Regulations. He is simply attempting, after the statute of limitations has run, to shift the basis for his claim and assert a new claim in the guise of an amendment of the earlier one. It is settled that the Commissioner is powerless in such a case to accept and act upon the amended claim. *United States v. Garbutt Oil Co.*, *supra*; *United States v. Andrews*, *supra*; *United States v. Prentiss & Co.*, *supra*. The court below properly observed (R. 53-54) that "There was no action on the part of the Commissioner of Internal Revenue which constituted a waiver, since the Commissioner is powerless to waive the substantive requirements of the statute requiring that the claim be presented within a given period of time * * *. The function of the statute, like that of limitations generally, is to give protection against stale demands".

CONCLUSION

No suit for recovery of taxes paid can be maintained unless a claim for refund or credit has been filed setting forth the grounds for recovery. No recovery can be had except upon the grounds alleged in the prior claim. The refund claim of March 13, 1948, stated a specific ground and did not present the ground upon which this action is based. The purported amendment of February 16, 1951, setting forth the ground upon which this suit is based was untimely and therefore was not a permissible amendment of the original claim. Accordingly the District Court correctly held that the action of the Commissioner in disallowing the claim for refund was proper, and its judgment should be affirmed.

Respectfully submitted,

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OCTOBER, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing of such claim unless the

Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3772.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7422.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152] *Claims for Refunds by Taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040A, or by the use of Form W-2 (Rev.), as provided in this section, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

* * * * *

The Commissioner has no authority to refund on equitable grounds penalties or other amounts legally collected. * * *

Sec. 29.322-7. *Limitations Upon the Crediting and Refunding of Taxes Paid.*—(a) *General rule.*—Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired. If no return is filed by the taxpayer, the Commissioner is prohibited from allowing or making a credit or refund of such tax after two years from the time the tax was paid unless before the expiration of such 2-year period a claim therefor is filed. * * *

* * * * *

No. 15605

United States
Court of Appeals
for the Ninth Circuit

GEORGE L. SCHARPF and
WILLIAM FRED SCHARPF, Executors of the
Estate of Louis C. Scharpf,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLANTS

CARL E. DAVIDSON,
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Attorneys for Appellants.

FILED

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statement of the Case	2
Specification of Errors	6
Summary of Argument	7
Argument	
I. The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 was filed within two years of the date of payment of the tax, the recovery of which was sought in the District Court. At the time the claim was filed the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.	8
II. In the alternative, appellants contend that the refund claim filed on February 16, 1951, was a proper and timely amendment of the earlier refund claim as it was filed prior to the formal disallowance of the first refund claim.	14
III. In the further alternative, appellants contend that the various exhibits introduced in the Tax Court trial of the case of Twin Oaks Company v. Commissioner evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.	16

INDEX (Continued)

	Page
IV. In the further alternative, appellants contend that the statements contained in the letter of March 6, 1948, constituted an informal refund claim.	19
V. In the final alternative, appellants contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.	21
Conclusion	23

TABLE OF AUTHORITIES DECISIONS

Page

Addressograph-Multigraph Corp. v. U. S., Ct. Cl., 78 F. Supp. 111	15
Andrews v. U. S., 302 U. S. 517, 58 S. Ct. 315	16
Angelus Milling Co. v. Comm'r., 325 U. S. 293, 65 S. Ct. 1162	23
Cumberland Portland Cement Co. v. U. S., Ct. Cl., 104 F. Supp. 1010	20
Garbutt Oil Co. v. U. S., 302 U. S. 528, 58 S. Ct. 320	16
Higginson v. U. S., Ct. Cl., 81 F. Supp. 254	10
Hrcka v. Crenshaw, 237 F. 2d 372	20
Kales v. U. S., 314 U.S. 186, 62 S. Ct. 214	19
Keneipp v. U. S., 184 F. 2d 263	10-11
Memphis Cotton Oil Co. v. U. S., 288 U. S. 62, 53 S. Ct. 278	21-22
National Forge & Ordnance Co. v. U. S., Ct. Cl. — F. Supp. —	13
Night Hawk Leasing Co. v. U. S., Ct. Cl., 18 F. Supp. 938	20
Pierotti v. U. S., 154 F. 2d 758	17-18
Pink v. U. S., 105 F. 2d 183	15
Rogan, Collector v. Ferry, 154 F. 2d 97	17-18
Scovill Mfg. Co. v. Fitzpatrick, 215 F. 2d 567	10
Smale & Robinson, Inc. v. U. S., 123 F. Supp. 457	22
Stuart v. U. S., Ct. Cl., 130 F. Supp. 386	20
Twin Oaks Company v. Comm'r., 183 F. 2d 385	4, 11

UNITED STATES CODE

Page

Section 322 (b), 1939 Internal Revenue Code	8-9, 21
Section 3772(a) (1), 1939 Internal Revenue Code ..	9

REGULATIONS

Regulations 111, Sec. 29.322-3	9-10
--------------------------------------	------

United States
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GEORGE L. SCHARPF and
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vs.

UNITED STATES OF AMERICA,

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On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court is not reported in the
official reports.

JURISDICTION

This is an appeal by the executors of the Estate of Louis
C. Scharpf from a judgment of the United States District
Court for the District of Oregon in an income tax refund
action relating to the year 1944.

The tax in dispute was paid on March 8, 1948 (R. 6).

A refund claim was filed on March 13, 1948, and an amended refund claim was filed on February 16, 1951 (R. 6-7). Both claims were rejected on August 31, 1954 (R. 9). Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on September 19, 1955 appellants brought an action in the District Court for recovery of the tax paid (R. 40). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on April 4, 1957 (R. 41). Within 60 days thereafter and on May 31, 1957 a notice of appeal was filed (R. 41). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

The matter was presented to the District Court upon the stipulated facts set forth in the pretrial order together with the exhibits attached thereto. The only issue to be determined by this Court is the adequacy of the refund claims filed by the appellants' testator, since the appellee has stipulated that, if the Court finds a compliance by the decedent with the statutes and regulations relating to the filing of refund claims, the appellants are entitled to a refund in the amount of \$4,006.20, less the \$122.55 heretofore refunded to them, together with interest thereon as provided by law (R. 10).

In the year 1941 the decedent and his wife and one John J. Rogers and his wife formed a two-family partner-

ship under the name of Twin Oaks Builders Supply Co. to conduct a general building supply business in Eugene, Oregon. The same four people owned and controlled a corporation known as Twin Oaks Company, which owned the land and buildings used by the partnership under a lease agreement (R. 4-5).

In October of 1947 the Bureau of Internal Revenue decided not only to disallow each of the two-family partnerships but also to tax all of the partnership income to the corporation (R. 5). In December of 1947 the corporation filed its petition to the Tax Court of the United States, objecting to having the partnership income taxed to it, and in March of 1948 the decedent paid his individual tax deficiency under protest and filed a general protective refund claim a few days later. The statement incorporated in that refund claim was as follows:

"In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United

States shall have been rendered *and a final determination had as to the taxation of the income of this taxpayer.*" (Ex. 12, R. 6). (emphasis supplied)

In July of 1948 the corporation's income tax case came on for trial in the Tax Court, and in March of 1949 a decision was entered in favor of the Commissioner of Internal Revenue (R. 5-7). The corporation appealed its case to this Court, and in July of 1950 this Court reversed the decision of the Tax Court and held not only that the partnership income could not be taxed to the corporation but further declared that "the partnership was entitled to full recognition for tax purposes." *Twin Oaks Company vs. Commissioner*, 183 F. 2d 385.

In February of 1951 the decedent, Louis C. Scharpf, filed an amended refund claim for the year 1944 which was intended to clarify the grounds set forth in his original refund claim. The statement attached to the amended refund claim was as follows:

"On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the City of Eugene, Oregon. Each of the parties contributed \$2000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,-

378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

"In entering into the said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

"The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

"This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less overassessment determined to be due on such ground to Eva M. Scharpf." (Ex. 13, R. 7-9).

In October of 1954 appellants were advised by the District Director of Internal Revenue in Portland, Oregon, that it was determined and agreed that there was an overassessment or overpayment of the income tax of Louis C. Scharpf for the year 1944 in the amount of \$4,006.20, (R. 9), but the Director refused to refund the amount which was admitted to be owing, making the technical contentions that:

(a) The refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of Internal Revenue of the exact basis therefor, and

(b) The amended refund claim filed February 16, 1951, although apprising the Commissioner of Internal Revenue of the exact basis therefor, was not timely and could not be considered as an amendment of the first refund claim.

SPECIFICATION OF ERRORS

1. The District Court erred in its Conclusion of Law No. 1, in concluding that "The claim for refund filed on March 13, 1948, by Louis C. Scharpf for the year 1944 was not a proper claim for refund inasmuch as it did not set forth the grounds or basis of this proceeding as required by Sections 322 and 3772 of the Internal Revenue Code of 1939."

2. The District Court erred in its Conclusion of Law No. 2, in concluding that "The claim for refund filed on February 16, 1951, by Louis C. Scharpf for the year 1944 was not a timely and proper claim for refund as required by Sections 322 and 3772 of the Internal Revenue Code of 1939, nor was it a timely or proper amendment of his earlier claim for refund."

3. The District Court erred in its Conclusion of Law

No. 3, in concluding that "The Commissioner of Internal Revenue waived none of his requirements in respect to the form or content of the claims for refund."

4. The District Court erred in its Conclusion of Law No. 4, in concluding that "The action of the Commissioner of Internal Revenue in disallowing the claims for refund was proper."

5. The District Court erred in entering judgment for the appellee.

SUMMARY OF ARGUMENT

1. The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 (Exhibit 12, R. 6-7) was filed within two years of the date of payment (March 8, 1948) of the tax, the recovery of which is sought in this action. At that time the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

2. In the alternative, appellants contend that the refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Exhibit 13, R. 7-9) was a proper and timely amendment of his earlier refund claim, as it was filed prior to the formal disallowance of said refund claim.

3. In the further alternative, appellants contend that the various exhibits introduced in the Tax Court trial of the case of *Twin Oaks Company v. Commissioner* evidences that fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

4. In the further alternative, appellants contend that the statements contained in the letter of March 6, 1948, (Exhibit 11, R. 26-27) constituted an informal refund claim.

5. In the final alternative, appellants contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.

ARGUMENT

I.

The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 was filed within two years of the date of payment of the tax, the recovery of which was sought in the District Court. At the time the claim was filed the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

Section 322(b) of the 1939 Internal Revenue Code (applicable to the year 1944 in question here) provided,

so far as material here, that a refund claim had to be filed within "two years from the time the tax was paid." Since the first refund claim was filed only a few days after the payment (R. 6), it is readily apparent that there was a timely refund claim.

Suits for refunds were governed by Section 3772(a)(1) of the 1939 Internal Revenue Code, which provided as follows:

"Claim—No suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

The pertinent part of the Regulation implementing these code sections provided:

"No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the

Commissioner of the exact basis thereof." (Reg. 111, Sec. 29.322-3)

Appellants submit that the District Court overstressed the first part of the original refund claim and failed to note that the decedent in his original claim also was asking to have his tax matters for the year 1944 held in abeyance pending the outcome of the corporation's litigation. The family partnership issue was indirectly involved. (R. 31-36)

Since Louis C. Scharpf had paid the deficiency upon the basis of the revenue agent's report disallowing the family partnership (Exhibit 4), it can hardly be questioned that the Commissioner was unaware of the basis of the claim. The decedent's payment of the additional tax on March 6, 1948, accompanied by his letter of transmittal in which he indicated his protest (Exhibit 11, R. 26-27), followed a few days later by the refund claim, should have left no doubt as to the general nature of his claim. The Commissioner was not misled by the somewhat vague statement of the grounds for refund. Cf. *Scovill Manufacturing Co. v. Fitzpatrick, Collector*, 215 F. 2d 567. "The sufficiency of a claim for refund is to be judged by the substance as related to the facts, rather than the form in which it is stated." *Higginson v. U. S., Ct. Cl.*, 81 F. Supp. 254.

The Court of Appeals for the District of Columbia Circuit, in the case *Keneipp v. U. S.*, 184 F.2d 263, suggested

that the public policy involved in cases of this nature should be as follows:

"The principles which determine the sufficiency of claims for refund have been stated and restated. The rule is that the claim must be sufficient to advise the Commissioner of Internal Revenue as to the items as to which the taxpayer claims error and the grounds upon which the taxpayer makes his claim. If the Commissioner understands the grounds and deals with the claim on the basis of his understanding, the claim is sufficient. A basic public policy is involved in this broad doctrine. Insistence upon nice technicalities of expression on the part of taxpayers in dealings with the Government concerning taxes must certainly compel taxpayers to deal with the Government through technicians. The Bureau of Internal Revenue has long sought to encourage a direct, informal and non-technical presentation."

The record of the then current dealings between the Bureau of Internal Revenue and the taxpayer, as shown by the numerous exhibits herein, should leave little doubt that the Commissioner was at that time apprised of sufficient facts to ascertain the exact basis of the decedent's claim.

As a result of the Commissioner's letter of October 3, 1947, (R. 5) Louis C. Scharpf, on March 6, 1948, paid the assessment of \$8,328.06 by a check for \$3,403.97 plus a credit for the overassessments determined for his wife, Eva M. Scharpf (R. 6, 26-28). This credit included the payment of \$4,196.25, the full amount of the tax which the wife

paid for the year 1944 (Ex. 2), and it was based upon the fact that she and her husband were bona fide partners.

On March 13, 1948, Louis C. Scharpf filed a claim for refund of \$7,131.44 (R. 6), which represented his 1944 tax (Ex. 1) computed on the basis that he and his wife were bona fide partners.

If at that time Louis C. Scharpf had decided to forego his claim that a bona fide partnership existed between him and his wife, he would have filed a claim for \$15,459.50 (\$7,131.44 plus \$8,328.06) instead of a claim for only \$7,131.44. If all of the income properly belonged to the corporation, as contended by the Commissioner in the corporation's Tax Court proceeding, he would have been entitled to the larger amount.

On the same day that Louis C. Scharpf filed his first refund claim, his wife filed a refund claim for \$4,196.28 (Ex. 14, R. 27-29), even though she had previously authorized the Commissioner to credit such overassessment against her husband's deficiency (R. 27). The Commissioner advised her to do so (Ex. 5). In her claim (R. 29) she called attention to the fact that the Commissioner had ruled that her income for the year 1944 was taxable to her husband and she also called attention to the proceeding in the Tax Court in which the Commissioner claimed that the income that she and her husband had reported was properly income

of the corporation. Her claim for refund stated, in part, "Should the Commissioner prevail in either of these positions, this taxpayer will be entitled to a refund (of) all or substantially all of the tax paid by her as above described."

The only basis upon which she would have been entitled to a return of the \$4,196.25 would be if it was determined that the Commissioner had erred in deciding that she and her husband were not bona fide partners but that he was correct in determining that the income properly belonged to the corporation. We submit that the filing of these two claims together also put the Commissioner on notice that the claim of Louis C. Scharpf for a refund was based in part upon the Commissioner's wrongful refusal to recognize the partnership.

On September 6, 1949, the Commissioner acknowledged that he had examined the refund claim of Eva M. Scharpf and the issues raised therein (R. 30).

In *National Forge & Ordnance Company v. The United States*, decided July 12, 1957, the Court of Claims had the following comments on the position taken by the government in these cases:

"Attorneys for the Government frequently ask us to apply to claims for refund a requirement of particularity almost as strict as is customarily applied to indictments

for crime. The rule of *strictissimi juris* is not applicable to claims for refund. All that is required of them, as a predicate for suit in this court is that they put the Commissioner of Internal Revenue on notice of the ground of the taxpayer's claim that his taxes were erroneously computed. This does not have to be stated with any greater particularity than is necessary to draw the Commissioner's attention to the claim he makes in his subsequent suit."

II.

In the alternative, appellants contend that the refund claim filed on February 16, 1951, was a proper and timely amendment of the earlier refund claim as it was filed prior to the formal disallowance of the first refund claim.

A refund claim may be amended at any time before it is formally rejected, and any number of refund claims may be filed for the same taxable year.

Assuming, *arguendo*, that the original refund claim was not adequate to apprise the Commissioner of Internal Revenue of the taxpayer's claim, then we submit that the grounds thereof were duly clarified by the claim filed on February 16, 1951. Since the two year period following payment of the tax ended on March 6, 1950 (a few months prior to the decision of this Court in *Twin Oaks Company v. Commissioner*, *supra*), the question is presented as to whether the original March, 1948 claim could be amended by the Feb-

ruary, 1951 claim. It should be remembered that the March, 1948 claim had not been rejected prior to the filing of the amended claim—in fact, both claims were formally rejected at the same time on August 31, 1954. (R. 9-10)

The general rule applicable to the filing of amended refund claims, after the statute of limitations has run, was stated by the Court of Claims in its opinion in *Addressograph-Multigraph Corp. v. United States*, 78 F. Supp. 111, at 121:

“Without reviewing all of the cited authorities, it is well to note the statement of the rule which was set out in the case of *Pink v. United States*, 2 Cir., 1939, 105 F.2d 183, 187,

‘Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim, the amendment is proper. *Bemis Bro. Bag Co. v. United States*, 289 U. S. 28, 53 S. Ct. 454, 77 L. Ed. 1011; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; *United States v. Factors & Finance Co.*, 288 U. S. 89, 53 S. Ct. 287, 77 L. Ed. 633. The rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. *United States v. Andrews* 302 U. S. 517, 58 S. Ct. 315,

82 L. Ed. 398; *United States v. Garbutt Oil Co.*, 302 U. S. 528, 58 S.Ct. 320, 82 L. Ed. 405; *Marks v. United States*, 2 Cir., 98 F.2d 564.' ”

The *Andrews* and *Garbutt Oil Co.* cases, cited above, decided the same day by the Supreme Court, appear to be inapposite here because the family partnership issue which was specifically stated in the amended claim of Louis C. Scharpf would have been “disclosed by an investigation of the original claim.” The original refund claim referred to the proceeding in the Tax Court, and an examination of the Tax Court proceedings (Ex. 16, R. 31-36) and the exhibits introduced therein (Ex. 15 (a) to (h), incl.) will show that the Commissioner was well aware of the continuing controversy on the family partnership issue.

III.

In the further alternative, appellants contend that the various exhibits introduced in the Tax Court trial of the case of *Twin Oaks Company v. Commissioner* evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

An examination of the various exhibits in the Tax Court proceedings which were received in evidence by the District Court in this proceeding should demonstrate the fact

that the Commissioner was not misled by the first refund claim which was filed. We have also had printed for the examination by this Court a portion of the opening statement by counsel for the Commissioner in the Tax Court proceedings (R. 34-36) which clearly indicates that the Commissioner was fully apprised of the nature of the decedent's claim.

Since the tax in question here was paid in March, 1948, it should follow that, even if we accept appellee's theory, any documents filed by the taxpayer before March 1950 constitute timely amendments to the original refund claim. The Tax Court trial took place in June 1948, and appellants submit that the various exhibits introduced by the decedent at that time constituted amendments of and supplements to the original refund claim.

Two 1946 decisions of this Court, namely, *U. S. v. Pierotti*, 154 F. 2d 758, and *Rogan, Collector v. Ferry*, 154 F.2d 974, indicate that this Court favors the realistic application of the refund claim regulations which appellants are asking this Court to apply to the instant case. In the *Pierotti* case this Court stated:

"The Supreme Court of the United States has held that a notice fairly advising the Commissioner of Internal Revenue of the nature of taxpayer's claim which could nevertheless be rejected by him because too general or

not complying with formal requirements, may be amended *after* the statute of limitations has run to correct the lack of specificity. It would therefore seem clear that supporting documents adding new and alternate grounds for refunds, filed with the Commissioner two years *before* the statute of limitations had run, may be considered as amendments or additions to the original claim.

"The principal requirement of the law and the regulations is that the Commissioner be apprised of the exact basis of each ground on which a refund is claimed in order that he may investigate the facts relative to these grounds and make his decision accordingly.

"A taxpayer may state as many grounds for refunds as he wishes, regardless of consistency, provided facts are disclosed on which the Commissioner may act. *Kales v. United States*, 6 Cir., 115 F. 2d 497, 501, affirmed 314 U. S. 186, 62 S.Ct. 214, 86 L. Ed. 132. Affidavits, letters or other statements filed with the Commissioner in support of the claim may all be considered as part of the claim for refund, if they bring the matters in controversy to the attention of the Commissioner and disclose grounds and facts on which he may act intelligently."

In *Rogan v. Ferry*, *supra*, this Court pointed out that "The statute and regulations governing claims are devised for the convenience of government officials in passing on claims for refunds and in preparing for trial, and they are not 'traps for the unwary'."

IV.

In the further alternative, appellants contend that the statements contained in the letter of March 6, 1948, (R. 26-27) constituted an informal refund claim.

The letter of March 6, 1948, with which the payment of the additional tax for the year 1944 was made, contained the following statement:

"The payment of the deficiency above described and the application of the credits as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision."

There are a number of cases which have held that a letter of protest may qualify as an informal refund claim which would be susceptible to amendment after the two year period had run. In *United States v. Kales*, 314 U. S. 186, 62 S.Ct. 214, the taxpayer had written a letter of protest in which she stated that she "will claim the right to a refund" if other pending litigation was decided in her favor. The court held that this was sufficient, and stated:

"This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of

the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S.Ct. 278, 77 L. Ed. 619; *United States v. Factors and Finance Co.*, 288 U.S. 89, 53 S.Ct. 287, 77 L. Ed. 633; *Bemis Bros. Bag Co. v. United States*, 289 U. S. 28, 53 S.Ct. 454, 77 L. Ed 1011; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 384, 53 S. Ct. 620, 624, 77 L. Ed. 1265. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such. *Bonwit Teller Co. v. United States*, 283 U. S. 258, 51 S.Ct. 395, 75 L. Ed. 1018; *United States v. Memphis Cotton Oil Co.*, *supra*, 288 U. S. at page 70, 53 S.Ct. at page 281, 77 L. Ed. 619."

Informal refund claims have also been recognized in recent years in *Cumberland Portland Cement Co. v. U. S.*, Ct. Cl. 1952, 104 F. Supp. 1010 (in which two judges concurred with the statement that "An equitable conclusion has been reached. If this is not the law, it ought to be.") *E. H. Stuart v. U. S.*, Ct. Cl. 1955, 130 F. Supp. 386, and *Hrčka v. Crenshaw, Collector*, 1956, 140 F. Supp. 350, *aff'd. per curiam* by CCA4, 237 F.2d 372.

In *Night Hawk Leasing Co. v. United States*, 18 F. Supp. 938, the Court of Claims held that even a notation on the back of a check paying the taxes was sufficient to constitute an informal claim, which was perfected by a formal claim filed after the statutory period had expired.

V.

In the final alternative, appellants contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations to the required form of a refund claim.

Section 322(b)(1) of the 1939 Internal Revenue Code required only that a refund claim be filed within two years after the tax was paid. Since the first refund claim was filed only a few days after the tax was paid, (R. 6), there can be no question that the decedent complied with the terms of the *statute*. Appellants do not contend that the Commissioner could waive this statutory and jurisdictional requirement; however, we respectfully submit that the Commissioner may, and in this case did, waive the requirements of his regulations as to the form of the original refund claim.

This distinction between the function of the statute and the function of the regulations was pointed out by the Supreme Court in the case of *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S.Ct. 278 at 281:

"The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim

as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old."

In *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, a decision of the District Court for the Southern District of California, the court stated the general rule to be as follows:

"The Commissioner is powerless to waive the substantive requirements of the statute, *United States v. Garbutt Oil Co.*, 1938, 302 U.S. 528, 533-535, 58 S.Ct. 320, 82 L.Ed. 405, but he may waive the formal requirements of the regulations. *Tucker v. Alexander*, 1927, 275 U.S. 228, 48 S.Ct. 45, 72 L.Ed.253. Sound reason for holding that the Commissioner has power to waive such formalities, even though specified in regulations having 'the force of law' and binding the Commissioner as well as the taxpayer, *United States ex rel. Accardi v. Shaughnessy*, 1954, 347 U.S. 260, 265, 74 S.Ct. 499; *Chapman v. Sheridan-Wyoming Co.*, 1950, 338 U.S. 621, 629, 70 S. Ct. 392, 94 L. Ed. 393; *Bridges v. Wixon*, 1945, 326 U.S. 135, 153, 65 S.Ct. 1443, 89 L.Ed. 2103, is found in the fact that requirements as to form are designed for the benefit of 'the officers charged with the collection of the revenue.' *Nichols v. United States*, 1869, 7 Wall. 122, 126, 74 U.S. 122, 126, 19 L.Ed. 125.

"Authorized tax officials have the power then to waive regulatory requirements as to procedure and form

which are shown to be intended solely for the benefit of their convenience in the administration of the revenue laws."

As noted by the Supreme Court in *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 65 S.Ct. 1162, "Candor does not permit one to say that the power of the Commissioner to waive defects in claims for refund is a subject matter made crystal-clear by the authorities." However, we submit that consideration of all of the attendant facts in the instant case leads inevitably to the conclusion that the Commissioner's action constituted a waiver of his regulations as to the form of the refund claim.

We respectfully submit that the District Court failed to distinguish between the function of the statute and the function of the regulations.

CONCLUSION

In conclusion, we respectfully submit that the record amply shows that the Commissioner of Internal Revenue was at all times fully aware of the nature of the decedent's claim. It is submitted that the District Court erred in permitting the government to retain the additional tax which it admits was improperly exacted from Louis C. Scharpf.

Respectfully submitted,
CARL E. DAVIDSON,
CHARLES P. DUFFY,

Attorneys for Appellants

No. 15605

United States
Court of Appeals
for the Ninth Circuit

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

vs.

UNITED STATES OF AMERICA.

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

AUG 27 1957

PAUL M. HARRIS, CLERK

No. 15605

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GEORGE L. SCHARPF and WILLIAM FRED
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Certificate of Clerk	41
Docket Entries	40
Exhibits, Appellants':	
No. 7—Protest of Louis C. Scharpf, Dated September 25, 1946, Re Year 1944	24
11—Letter Dated March 6, 1948, Trans- mitting Payment of 1944 Deficiency Under Protest	26
14—Claim for Refund and Letter. Dated September 6, 1949	27
16—Excerpt From Transcript of Rec- ord, Twin Oaks Co. v. C. I. R.	31
19—Protest of Louis C. Scharpf, Re Year 1944	37
Findings of Fact and Conclusions of Law	14
Judgment	22
Notice of Appeal	23
Pretrial Order	3
Statement of Points on Appeal	44

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In the United States District Court
for the District of Oregon

Civil No. 8282—105-32

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of LOUIS
C. SCHARPF,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PRETRIAL ORDER

This cause came on regularly for a pretrial conference before the Honorable Gus J. Solomon, one of the judges of the above-entitled court, at Portland, Oregon, on the 13th day of February, 1956, plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, and defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney.

Admitted Facts

It appears from the pleadings and the pretrial proceedings that the following facts are admitted and may be taken and deemed by the Court, on the trial of this action, as established facts therein:

I.

This is an action for the recovery of individual income taxes for the year 1944 assessed against

Louis C. Scharpf and collected from him by a former Collector of Internal Revenue for the District of Oregon. Jurisdiction of this action exists by virtue of Section 1346(a)(1) of Title 28 of the United States Code, as amended.

II.

During the year 1944 Louis C. Scharpf and Eva M. Scharpf were husband and wife, residing in the City of Eugene, County of Lane, State of Oregon. Louis C. Scharpf died on May 10, 1952, and, thereafter, George L. Scharpf and William Fred Scharpf, plaintiffs herein, were duly appointed by the Circuit Court of Lane County, Oregon, as the executors of his estate, and they are still acting in that capacity.

III.

On or about January 25, 1941, Louis C. Scharpf and his wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting, under the name of Twin Oaks Builders Supply Co., a general building supply business in the City of Eugene, Oregon. During the year 1944 the business of Twin Oaks Builders Supply Co. was carried on in accordance with the terms of the partnership agreement, and Louis C. Scharpf and Eva M. Scharpf duly reported their respective incomes therefrom and paid their individual income taxes thereon to the then Collector of Internal Revenue for the District of Oregon.

IV.

Under date of October 3, 1947, the Commissioner of Internal Revenue of the United States, through the Internal Revenue Agent in Charge of the Seattle Division of the Bureau of Internal Revenue, notified Louis C. Scharpf of an income tax deficiency asserted against him for the year 1944 in the amount of \$8,328.06, based upon the assertion that one-half of the income from Twin Oaks Builders Supply Co., during the year 1944 was taxable to Louis C. Scharpf and none to his wife, Eva M. Scharpf.

On the same date, namely October 3, 1947, the Commissioner of Internal Revenue of the United States, through the Internal Revenue Agent in charge of the Seattle Division of the Bureau of Internal Revenue, notified Twin Oaks Company (a corporation owned and controlled by the partners of Twin Oaks Builders Supply Co.) of deficiencies asserted against it for the years 1942, 1943 and 1944 based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Co. for each of the years in question was taxable to said corporation rather than to the partners.

On December 24, 1947, Twin Oaks Company duly filed a petition to The Tax Court of the United States, Docket No. 16845, seeking a redetermination of the said deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner of Internal Revenue and the trial of said cause took place on June 7 and June 8, 1948.

V.

Pursuant to notice and demand, dated February 26, 1948, Louis C. Scharpf paid to the then Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, the sum of \$9,792.31, representing the said asserted deficiency of \$8,328.06 plus interest thereon in the amount of \$1,464.25. The said payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of a total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948 (Exhibit 11). Thereafter, on March 13, 1948, Louis C. Scharpf duly filed with the then Collector of Internal Revenue of the United States for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The statement incorporated in said claim for refund was as follows:

“In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and

it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final determination had as to the taxation of the income of this taxpayer.”

VI.

The decision of The Tax Court of the United States in the case of Twin Oaks Company vs. Commissioner, referred to in said refund claim, was filed on July 18, 1949, in favor of the Commissioner of Internal Revenue. Thereafter, Twin Oaks Company appealed said decision and, under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued its opinion in said case (Twin Oaks Company vs. Commissioner of Internal Revenue, 183 F.2d 385) reversing the decision of The Tax Court, finding that The Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation.

VII.

On February 16, 1951, Louis C. Scharpf filed a claim for refund in the amount of \$4,138.70 for the year 1944. The said refund claim purported to be an amendment of the refund claim filed by Louis C. Scharpf for the same year on or about March 12, 1948. The statement attached to said refund claim was as follows:

“On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a

written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the City of Eugene, Oregon. Each of the parties contributed \$2,000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

“In entering into the said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

“The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

“This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the

distributive income of Eva M. Scharpf from the said partnership was taxable to me, less over-assessment determined to be due on such ground to Eva M. Scharpf.”

VIII.

Under date of October 15, 1954, plaintiffs, as executors of the estate of Louis C. Scharpf, deceased, received from the District Director of Internal Revenue, in Portland, Oregon, “notice of adjustment” of the income tax liability of Louis C. Scharpf for the year 1944, in which it was determined and agreed that there was an overassessment or overpayment of the income tax of Louis C. Scharpf for the year 1944, in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director of Internal Revenue in Portland, Oregon, allowed a refund to plaintiffs of only \$122.55, being the amount of income tax and interest paid by Louis C. Scharpf for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, together with interest thereon in the amount of \$40.25, was refunded to plaintiffs on or about October 18, 1954.

IX.

The original claim for refund filed by Louis C. Scharpf had not been rejected prior to the filing of his amended refund claim but, under date of October 19, 1954, plaintiffs received statutory notices of the disallowance of both the original and amended

refund claims filed by Louis C. Scharpf for the year 1944.

X.

Defendant agrees that if the Court finds a compliance by Louis C. Scharpf with the statutes and regulations relating to the filing of refund claims, then plaintiffs are entitled to a refund in the amount of \$4,006.20, less the \$122.55 heretofore refunded to them, together with interest thereon as provided by law.

Plaintiffs' Contentions

I.

The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 12), was filed within two years of the date of payment (March 8, 1948) of the tax, the recovery of which is sought in this action. At that time the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

II.

The refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 13), was a proper and timely amendment of his earlier refund claim as it was filed prior to the formal disallowance of said refund claim.

III.

The various exhibits introduced in The Tax Court trial of the case of Twin Oaks Company vs. Com-

missioner evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

IV.

The statements contained in the letter of March 6, 1948 (Plaintiffs' Exhibit 11), constituted an informal refund claim.

V.

In the alternative, plaintiffs contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.

Defendant's Contentions

I.

The claim for refund filed on March 13, 1948, did not apprise the Commissioner of Internal Revenue of the grounds for refund asserted in this action and was not a timely claim for refund within the provisions of Section 322 of the Internal Revenue Code of 1939.

II.

The refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 13), was not a proper and timely amendment of his earlier refund claim.

III.

The various exhibits introduced in The Tax Court trial of the case of Twin Oaks Company vs. Commissioner do not evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents do not constitute amendments of and supplements to the original refund claim.

IV.

Defendant contends that the actions of the Commissioner of Internal Revenue did not constitute a waiver of his regulations as to the required form of a refund claim.

Issues to Be Determined

I.

Whether or not the original refund claim filed by Louis C. Scharpf for the year 1944, was amended by the various documents filed prior to the expiration of two years from the date on which the tax was paid.

II.

Whether or not the original refund claim filed by Louis C. Scharpf for the year 1944, could be amended after the expiration of two years from the date on which the tax was paid, but prior to the formal disallowance thereof by the Commissioner of Internal Revenue on October 19, 1954.

III.

Whether or not Louis C. Scharpf filed a proper and timely claim for refund for the year 1944.

IV.

If the Court determines that Louis C. Scharpf did not comply with the regulations of the Commissioner of Internal Revenue relating to the form and contents of refund claims, whether or not the Commissioner of Internal Revenue waived such regulations.

It is agreed by the parties that this pretrial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The Court, finding that the foregoing clearly and accurately reflects the pretrial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pretrial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Dated this 14th day of February, 1956.

/s/ GUS P. SOLOMON,
District Judge.

Approved:

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

/s/ EDWARD J. GEORGEFF,
Of Attorneys for Defendant.

Lodged February 13, 1956.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been submitted on a pretrial order, exhibits and briefs of the parties; plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys; defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney; and this Court being fully advised in the premises and having rendered an Opinion dated December 14, 1956, makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is an action for the recovery of individual income taxes for the year 1944, assessed against Louis C. Scharpf and collected from him by a former Collector of Internal Revenue for the Dis-

trict of Oregon. Jurisdiction of this action is based on Section 1346(a)(1), Title 28 of the United States Code, as amended.

2. During the year 1944, Louis C. Scharpf and Eva M. Scharpf were husband and wife, residing in the city of Eugene, County of Lane, State of Oregon. Louis C. Scharpf died on May 10, 1952, and thereafter George L. Scharpf and William Fred Scharpf, plaintiffs herein, were duly appointed by the Circuit Court of Lane County as the executors of his estate, and they are still acting in that capacity.

3. On or about January 25, 1941, Louis C. Scharpf and his wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement effective January 1, 1941, for the purpose of conducting under the name of Twin Oaks Builders Supply Co., a general building supply business in the City of Eugene, Oregon. During the year 1944, the business of Twin Oaks Builders Supply Co. was carried on in accordance with the terms of the partnership agreement, and Louis C. Scharpf and Eva M. Scharpf duly reported their respective incomes therefrom and paid their individual income tax thereon to the then Collector of Internal Revenue for the District of Oregon.

4. Under date of October 3, 1947, the Commissioner of Internal Revenue notified Louis C. Scharpf of an income tax deficiency asserted against him for the year 1944, in the amount of \$8,328.06.

based upon the assertion that one-half of the income from Twin Oaks Builders Supply Co., during the year 1944, was taxable to him and none to his wife, Eva M. Scharpf. On the same date the Commissioner of Internal Revenue notified Twin Oaks Company (a corporation owned and controlled by the partners of Twin Oaks Builders Supply Co.), of deficiencies asserted against it for the years 1942, 1943 and 1944, based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Co. for each of the years in question was taxable to said corporation rather than to the partners. On December 24, 1947, Twin Oaks Company duly filed a petition to the Tax Court of the United States, Docket No. 16845, seeking a redetermination of the said deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner of Internal Revenue and the trial of said cause took place on June 7 and June 8, 1948.

5. Pursuant to notice and demand, dated February 26, 1948, Louis C. Scharpf paid to the then Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, the sum of \$9,792.31, representing the said asserted deficiency of \$8,328.06, plus interest thereon in the amount of \$1,464.25. The said payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of a total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948, which stated in part:

The payment of the deficiency above described and the application of the credit as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

Thereafter, on March 13, 1948, Louis C. Scharpf duly filed with the then Collector of Internal Revenue for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The reason set forth by him for the allowance of the claim was that:

In a proceeding now pending before the Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944, was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final de-

termination had as to the taxation of the income of this taxpayer.

6. The decision of The Tax Court of the United States in the case of Twin Oaks Co. vs. Commissioner, referred to in the claim for refund, was filed on July 18, 1949, in favor of the Commissioner of Internal Revenue. Thereafter, Twin Oaks Company appealed the decision and under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued its opinion in said case (Twin Oaks Co. vs. Commissioner, 183 F. 2d 385), reversing the decision of The Tax Court, finding that The Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation.

7. On February 16, 1951, Louis C. Scharpf filed a claim for refund in the amount of \$4,138.70 for the year 1944, which purported to be an amendment of the refund claim filed on March 13, 1948. The statement attached to said refund claim was as follows:

On or about January 25, 1941, I and my wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation,

in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300 per year each. The losses of the said business were to be divided equally among the partners.

In entering into said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects and was entitled to recognition for Federal income tax purposes.

This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less over-assessment determined to be due on such ground to Eva M. Scharpf.

8. Under date of October 15, 1954, plaintiffs as executors of the estate of Louis C. Scharpf, received from the District Director of Internal Revenue, in Portland, Oregon, "Notice of Adjustment" of the income tax liability of Louis C. Scharpf for

the year 1944, in which it was determined and agreed that there was an overassessment or overpayment of the income tax of Louis C. Scharpf for the year 1944, in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director of Internal Revenue in Portland, Oregon, allowed a refund to plaintiffs of only \$122.55, being the amount of the income tax and interest paid by Louis C. Scharpf for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, together with interest thereon in the amount of \$40.25, was refunded to plaintiffs on or about October 18, 1954. This action was based upon the Commissioner's determination (1) that the refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of Internal Revenue of the exact basis therefor, and (2) the refund claim filed on February 16, 1951, although apprising the Commissioner of Internal Revenue of the exact basis therefore, was not timely and could not be considered as an amendment of the first refund claim. Plaintiffs received statutory notices of disallowance of both the original and the amended refund claims on October 19, 1954.

Conclusions of Law

1. The claim for refund filed on March 13, 1948, by Louis C. Scharpf for the year 1944, was not a proper claim for refund inasmuch as it did not set forth the grounds or basis of this proceeding as required by Sections 322 and 3772 of the Internal Revenue Code of 1939.

2. The claim for refund filed on February 16, 1951, by Louis C. Scharpf for the year 1944, was not a timely and proper claim for refund as required by Sections 322 and 3772 of the Internal Revenue Code of 1939, nor was it a timely or proper amendment of his earlier claim for refund.

3. The Commissioner of Internal Revenue waived none of his requirements in respect to the form or content of the claims for refund.

4. The action of the Commissioner of Internal Revenue in disallowing the claims for refund was proper.

5. The defendant is entitled to judgment and costs.

April 4, 1957.

/s/ GUS P. SOLOMON,
United States District Judge.

Approved as to form only:

/s/ CHARLES P. DUFFY,
Attorney for Plaintiffs.

/s/ EDWARD J. GEORGEFF,
Attorney for Defendant.

[Endorsed]: Filed April 4, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8282

GEORGE L. SCHARPF AND WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This case having been submitted on an agreed Statement of Facts and exhibits contained in the pretrial order, and the court having rendered his opinion and having entered findings of fact and conclusions of law, now therefore in accordance therewith,

It Is Ordered that the plaintiffs' action be dismissed and that defendant have judgment for its costs.

Dated at Portland, Oregon, this 4th day of April, 1957.

/s/ GUS P. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, defendant, and
to C. E. Luckey, United States Attorney for the
District of Oregon, and Edward J. Georgeff,
Assistant United States Attorney for the Dis-
trict of Oregon, U. S. Courthouse Building,
Portland, Oregon, its attorneys.

Notice is hereby given that George L. Scharpf
and William Fred Scharpf, Executors of the Estate
of Louis C. Scharpf, plaintiffs above named, hereby
appeal to The United States Court of Appeals for
the Ninth Circuit from the final judgment entered
in this action on the 4th day of April, 1957, in favor
of defendant and against plaintiffs.

Dated this 31st day of May, 1957.

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed May 31, 1957.

APPELLANTS' EXHIBIT No. 7

Louis C. Scharpf
669 High Street
Eugene, Oregon

September 25, 1946.

Internal Revenue Agent in Charge
Seattle 1, Washington

Protest against the proposed determination of a deficiency of Federal Income Tax for the calendar year 1944, in the amount of \$8,124.67, as per Internal Revenue Agent's Report dated August 12, 1946, the entire amount being in dispute.

Dear Sir:

Protest is made against the proposed determination of a deficiency for the calendar year 1944, as described above.

The adjustment of income and the deficiency concerned in this protest are analyzed as follows:

	Per Agent's Report	As Corrected	Difference
Net income as per return filed	\$19,200.55	\$19,200.55	
Adjustments thereto:			
(a) Partnership	13,050.67		\$13,050.67
	<hr/>	<hr/>	<hr/>
Net income as adjusted	\$32,251.22	\$19,200.55	\$13,050.67
	<hr/>	<hr/>	<hr/>
Income tax thereon	\$15,256.11	\$ 7,131.44	\$ 8,124.67
	<hr/>	<hr/>	<hr/>

(a) The proposed adjustment made by the examining Agent to the taxpayer's net income for the

calendar year 1944 is the result of a proposed adjustment made to the taxpayer's distributive share of net income from Twin Oaks Builders Supply Co., a partnership, and as set out in Agent's Report on that Company under date of August 12, 1946. The examining Agent has transferred \$13,050.67 of the distributive share of partnership income of taxpayer's wife, Eva M. Scharpf, to the return of the taxpayer.

The taxpayer does not agree to the proposed adjustment for the reasons set out in protest of Twin Oaks Builders Supply Co., for the calendar year 1942, the statements contained therein not being repeated here, in the interest of brevity, but nevertheless being referred to and made a part of this protest.

The taxpayer's wife, Eva M. Scharpf, was a partner in Twin Oaks Builders Supply Co. during the calendar year 1944, and entitled to her distributive share of net income as reported on the partnership return filed, and no portion of her distributive share of net income from the partnership, as shown by the partnership return filed, is the net income of the taxpayer for purposes of federal income taxation.

In accordance with the foregoing, it is requested that it be found that there is no deficiency or over-assessment of tax for the calendar year 1944.

In the event you desire or require further information with respect to the foregoing, it is requested

that a hearing be arranged to be held at Portland, Oregon.

Please address a copy of all communications in this matter to my representative, Mr. Spencer R. Collins, 444 Miner Building, Eugene, Oregon.

Yours very truly,

/s/ LOUIS C. SCHARPF.

APPELLANTS' EXHIBIT No. 11

Twin Oaks Builders Supply Co.
Eugene, Oregon

March 6, 1948.

Collector of Internal Revenue
Portland, Oregon

Attention: Mr. R. P. Kueneke
In re: Louis C. Scharpf—1944

Dear Sir:

There is enclosed herewith a remittance in the amount of \$3,403.97 to cover the following items:

Notice and Demand dated February 26,
1948, addressed to Louis C. Scharpf—

1944 Additional IT	\$8,328.06	
Interest to 2-20-48	1,464.25	\$9,792.31

Overassessments of Eva M. Scharpf on
basis of notices of deficiency—

1943, Approximately	\$2,192.06	
1944, Approximately	4,196.28	6,388.34

Net Amount due remitted herewith.....	\$3,403.97
---------------------------------------	------------

There is enclosed herewith in duplicate a signed authorization to apply the overassessments computed or to be computed by the Commissioner as to Eva M. Scharpf to the account of Louis C. Scharpf.

The payment of the deficiency above described and the application of the credits as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

Yours very truly,

For LOUIS C. SCHARPF and
EVA M. SCHARPF.

SRC:bhs

Encls.

APPELLANTS' EXHIBIT No. 14

Form 843

Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp (Date received): [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund or Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Oregon,
County of Lane—ss.

Name of taxpayer or purchaser of stamps:

Eva M. Scharpf.

Business address:

669 High Street, Eugene, Oregon.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Oregon.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1944, to December 31, 1944.
3. Character of assessment or tax: Federal Income Tax.
4. Amount of assessment, \$4,196.28; dates of payment: Currently during 1944 and 1945 per return.

* * *

6. Amount to be refunded: \$4,196.28.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on March 15, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company, and also in notices of deficiency addressed to Louis C. Scharpf, taxpayer's spouse, under date of October 3, 1947, has determined that her income for the year 1944 is taxable to him. Should the Commissioner prevail in either of these positions this taxpayer will be entitled to a refund all or substantially all of the tax paid by her as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that no action be taken with respect thereto until final determinations shall have been had as to the taxation of the income of this taxpayer.

/s/

[In margin]: Original received Eugene, Ore.,
3-12-48.

U. S. Treasury Department
Internal Revenue Service
Securities Building
Seattle 1, Wash.

In Replying Refer to IT: Rev:LSB.

September 6, 1949.

Mrs. Eva M. Scharpf
669 High Street
Eugene, Oregon

In re: Claim for refund of \$4,196.28 for the
year 1944

Dear Mrs. Scharpf:

Reference is made to the claim referred to above,
filed by you for the refund of income taxes.

Inasmuch as an examination of this claim discloses that it raises issues which were allowed in the determination of the tax liability which formed the basis of the previous closing of your case, no further consideration will be given thereto.

Very truly yours,

/s/ S. R. STOCKTON,
Internal Revenue Agent
in Charge.

LSB:fee

APPELLANTS' EXHIBIT No. 16

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING STATMENT ON BEHALF
OF THE PETITIONER

By Mr. Davidson:

This involves the corporation income declared profits and declared excess profits asserted against the Twin Oaks Corporation for the year 1942.

The facts in the case are, briefly, these:

Prior to January 2, 1941, a corporation by the name of Twin Oaks Builders Supply Company was in the lumber and builders' supply business, with a principal place of business in Eugene, Oregon. The stock of that corporation was owned one-half by Mr. Rogers, and the other half by Mr. and Mrs. Scharpf, but out of that half owned by Mr. and Mrs. Scharpf, Mrs. Scharpf had acquired forty-six per cent and the remainder belonged to Mr. Scharpf, or four per cent. Now, Mr. Scharpf desired to have a greater interest in the business and insisted upon the company being dissolved, or, rather, upon the

formation of a partnership where he could have equal interest in the company, and Mrs. Scharpf was agreeable to that. So the corporation, after due consultation between the stockholders, was retained as a holding company, holding certain real property and office equipment. Accordingly, a new partnership was formed under the name of Twin Oaks Builders Supply Company, the name of the corporation being changed to Twin Oaks Company, its present name. That partnership purchased from the corporation the inventory and inventory values, which were cost or market, whichever was the lesser; also delivery equipment at book value, accounts receivable at face value, and took over the cash at face value.

The Court: Was it a partnership or a corporation which owned the assets?

Mr. Davidson: A corporation, your Honor. The partnership then entered into an agreement with the corporation for the rental of its property at \$250 a month, which was the value of the rental, a fair rental value; the business was thereafter conducted in the name of the partnership. The corporation continued as a holding company and collected rental upon its assets.

The Commissioner in this case has attacked the partnership, disallowing the status of both the wives as members of the partnership. A deficiency notice was filed, and the tax was paid, on that basis.

The Court: What year?

Mr. Davidson: For the years 1942, 1943 and 1944. The tax is really the income for 1944, but it

involves the income for those three years. Notwithstanding that, the Respondent has determined that all the income shall be taxed to the corporation for all purposes. The basis upon which the Respondent has made this claim is shown in the letter accompanying the deficiency notice, and the pertinent part of that letter reads as follows: "It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of Twin Oaks Builders' Supply Company, (2) your corporation purported to transfer certain of its properties to the alleged partnership and (3) your corporation purported to lease its real estate, buildings, furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for federal income tax purposes. Accordingly, the net income derived from the operation of the business conducted in the name of the Twin Oaks Builders' Supply Company for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years." It is our contention that these assets were purchased at fair market value, and that the properties of the corporation were leased at a fair rental value, and that no transactions have been conducted by the corporation so far as the sale of merchandise is concerned or any business, since that time; and upon that basis, the proper tax is to be on the members of the partnership.

OPENING STATEMENT ON BEHALF
OF THE RESPONDENT

By Mr. Pigg:

If the court please, I think counsel has given the court a fair picture of the background out of which the controversy arises, the issue being whether the income derived from the business carried on under the name of the purported partnership, the Twin Oaks Builders' Supply Company, for each of the years 1942, 1943 and 1944, is attributable to and should be included in the taxable income of this corporation, the Petitioner for those taxable years.

I would like to address myself next to counsel's observations insofar as they were directed to any determination or action of the Commissioner that is not directly involved in this proceeding, that is, to the determination or action as to which the partners, as such, were notified and by proper deficiency notice, that the partnership was not recognized for tax purposes insofar as their respective wives were purported to be partners, and proposing to tax the income attributable to the wives under the partnership arrangement to the husbands.

The court has no doubt already and no doubt it will be observed before the close of the proceeding, that this was an action taken by the Respondent for the purpose of protecting the revenue in the Government's interest. Insofar as those actions were inconsistent with the determinations as here made, the remedy of the parties involved, that is, the stockholders of this Petitioner corporation and the corre-

sponding partnership under the partnership arrangement, is by way of claim of refund if they have paid the tax.

Mr. Davidson has read to the court the paragraph of the deficiency notice, that is, the statement which accompanied the deficiency notice, which contains the essence of the Commissioner's determination in this case, and, consistent with that determination, it is the position and contention of the Respondent that his determination here should be sustained, because, as we believe will be shown by the evidence, this purported partnership was merely a tax-saving device, looking into business realities, whereby the Petitioner sat and seeks to channel its income not only to its stockholders, as such, but to the members of the immediate family.

Another principle upon which the Commissioner here relies is that, although the taxpayer may be allowed to choose whatever way he likes for the carrying on of his business, the Government is not required to acquiesce in the form so elected by the taxpayer, and it may require a look into the actualities, and if it is determined that the form that is so elected by the taxpayer is a sham or lacking in reality, or fiction, the Government may accept or disregard the fiction as best suits the purposes of the tax statute.

We believe it will be further shown that the arrangement which will be shown in this case are tantamount to an anticipatory arrangement, that is, an anticipatory assignment of income; and it is our contention that any anticipatory assignment of in-

come, through whatever form or whatever guise it may be accomplished, that does not absolve the Petitioner from tax liability, on the further ground that the economic realities, not the legal formalities, determine the tax competency, and that income is taxable to its creator or controller and not to its collector or beneficiary.

The determination in this case is not predicated upon Section 45 of the Internal Revenue Code, which relates to the election as between one taxable entity and another, and certain items of income and certain items of deduction in order to determine the true income. The determination here is that the alleged partnership is without substance and should be disregarded, and therefore there is no taxable entity for the purpose of recognition, or the application of the provisions of Section 45. However, I did not mean to undertake, if I could, to waive any provision of Section 45 or any other section of the Code. That I could not do if I attempted to. If it should appear, upon the conclusion of the evidence in this case, that Section 45 has any application, the Commissioner, of course, may rely on that section if it appears proper, and to the extent that it is proper; but it is certain that any such reliance would be in the alternative. I think that is all I have.

APPELLANTS' EXHIBIT No. 19

Law Offices of
Carl E. Davidson
1525 Yeon Building
Portland 4, Oregon

(Copy)

March 26, 1951.

Mr. S. R. Stockton
Internal Revenue Agent in Charge
Securities Building
Seattle 1, Washington

Re: Louis C. Scharpf,
669 High Street,
Eugene, Oregon,
Year 1944.

Dear Sir:

I acknowledge receipt of your letter of March 2, 1951, with which you enclosed a copy of the report of Revenue Agent C. H. Hardberger upon his examination of my income tax return for the year 1944, in connection with my claim for refund of \$7,131.44.

The examining revenue agent has recommended disallowance of my refund claim.

I protest the disallowance of the refund claim upon the facts stated in the said claim and the following additional facts: On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered

into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

In entering into the said partnership, the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

The foregoing additional facts are set out in an amended refund claim for the year 1944 in the amount of \$4,138.78, filed by me with the Collector

of Internal Revenue, Portland, Oregon, on February 16, 1951.

The status of my wife, Eva M. Scharpf, as a partner in the business for the years 1942 and 1943 was the subject of a complaint filed by me in the District Court of the United States for the District of Oregon on November 30, 1950, the same being docketed therein as Civil No. 5832. On March 19, 1951, my attorneys were advised by Mr. Theron L. Caudle, Assistant Attorney General, that an administrative refund would be authorized and directed in the full amount sought by me in the refund suit.

A hearing is requested on the recommended disallowance of my refund claim, with the further request that my amended refund claim be considered at the same time.

Very truly yours,

/s/ LOUIS C. SCHARPF.

State of Oregon,
County of Lane—ss.

I, Louis C. Scharpf, being first duly sworn, upon my oath do say: That I am the taxpayer above named; that I have read the foregoing protest and am familiar with the facts stated therein, and that said facts are true as I verily believe.

/s/ LOUIS C. SCHARPF.

Subscribed and sworn to before me this 29th day of March, 1951.

[Seal] /s/ BETTY H. SCHANZE,
Notary Public for Oregon.

My Commission expires: 1/26/53.

I, Carl E. Davidson, hereby certify that I am one of the attorneys for Louis C. Scharpf, the taxpayer above named, and as such attorney prepared the foregoing protest; that I have no personal knowledge of the facts stated in said protest.

.....

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

Sept. 19—Filed complaint.

Sept. 19—Issued summons—to marshal.

Sept. 21—Filed summons.

Nov. 17—Filed answer.

1956

Jan. 12—Entered order setting for P.T.C. on Feb. 6 and for trial on Feb. 13, 1956.

Feb. 6—Entered order setting for P.T.C. on Feb. 13 and order striking from trial.

Feb. 13—Entered order that plaintiffs have 60 days to file brief—defendant 60 days to answer and plaintiffs 30 days to reply.

Feb. 13—Lodged pretrial order and one copy.

1956

Feb. 14—Filed and entered pretrial order.

June 8—Filed brief for defendant.

June 21—Filed plaintiffs' reply brief and submitted.

Oct. 29—Filed supplemental brief for defendant.

Dec. 14—Filed opinion.

1957

Apr. 4—Filed and entered findings of fact and conclusions of law.

Apr. 4—Filed and entered Judgment for defendant with costs.

May 31—Filed notice of appeal by plaintiffs.

May 31—Filed bond for costs on appeal.

June 6—Filed designation of contents of record on appeal.

June 6—Filed stipulation to forward exhibits to C. of A.

June 6—Filed and entered order on stipulation providing for forwarding of exhibits.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of Fact and Conclusions of Law;

Judgment; Notice of Appeal; Bond for Costs on Appeal; Order to Forward Exhibits to Court of Appeals; Designation of Contents of Record on Appeal, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8282, in which George L. Scharpf and William Fred Scharpf, Executors of the Estate of Louis C. Scharpf, are the Plaintiffs and Appellants and the United States of America is the Defendant and Appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Plaintiffs' exhibits 1 to 14, inc., 15-A to H; 16 to 23, inc., and Defendant's exhibits A and B.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 25th day of June, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15605. United States Court of Appeals for the Ninth Circuit. George L. Scharpf and William Fred Scharpf, Executors of the Estate of Louis C. Scharpf, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15605

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

The above-named appellants, George L. Scharpf and William Fred Scharpf, executors of the estate of Louis C. Scharpf, intend to rely on the following points on their appeal to the United States Court of Appeals for the Ninth Circuit:

1. The District Court erred in its Conclusion of Law No. 1, in concluding that "The claim for refund filed on March 13, 1948, by Louis C. Scharpf for the year 1944 was not a proper claim for refund inasmuch as it did not set forth the grounds or basis of this proceeding as required by Sections 322 and 3772 of the Internal Revenue Code of 1939."

2. The District Court erred in its Conclusion of Law No. 2, in concluding that "The claim for refund filed on February 16, 1951, by Louis C. Scharpf for the year 1954 was not a timely and

proper claim for refund as required by Sections 322 and 3772 of the Internal Revenue Code of 1939, nor was it a timely or proper amendment of his earlier claim for refund."

3. The District Court erred in its Conclusion of Law No. 3, in concluding that "The Commissioner of Internal Revenue waived none of his requirements in respect to the form or content of the claims for refund."

4. The District Court erred in its Conclusion of Law No. 4, in concluding that "The action of the Commissioner of Internal Revenue in disallowing the claims for refund was proper."

5. The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 (Appellants' Exhibit 12) was filed within two years of the date of payment (March 8, 1948) of the tax, the recovery of which is sought in this action. At that time the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

6. In the alternative, appellants contend that the refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Appellants' Exhibit 13) was a proper and timely amendment of his earlier refund claim, as it was filed prior to the formal disallowance of said refund claim.

7. In the further alternative, appellants contend that the various exhibits introduced in the Tax Court trial of the case of *Twin Oaks Company v.*

Commissioner evidences the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

8. In the further alternative, appellants contend that the statements contained in the letter of March 6, 1948 (Appellants' Exhibit 11), constituted an informal refund claim.

9. In the final alternative, appellants contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.

10. The District Court erred in entering judgment for the appellee.

/s/ CHARLES P. DUFFY,
Of Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed June 26, 1957.

No. 15605

United States
Court of Appeals
for the Ninth Circuit

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

SEP 20 1957

PAUL R. HARRIS, CLERK

No. 15605

United States
Court of Appeals
for the Ninth Circuit

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
District of Oregon

In the United States District Court
for the District of Oregon

Civil No. 8282

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of
LOUIS C. SCHARPF,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

December 14, 1956.

OPINION

Solomon, Judge:

Plaintiffs, as executors of the estate of Louis C. Scharpf, deceased, seek to recover individual income taxes for the year 1944 assessed against and paid by the decedent.

The case is before the court upon an agreed statement of facts contained in the pretrial order as well as certain exhibits attached to the order.

These facts disclose that Scharpf and his wife, together with another married couple, entered into a written partnership agreement which provided that the profits of the business were to be divided equally between the four partners after paying \$9,000 per year to each of the husbands and \$300 per year to each of the wives.

On October 3, 1947, the Commissioner of Internal Revenue notified Scharpf of an income tax deficiency asserted against him for the year 1944 in the sum of \$8,328.06. This deficiency was based upon the Commissioner's contention that one-half of the income from the partnership during 1944 was taxable to him and that none of such income was taxable to his wife. On the same day, the Commissioner notified Twin Oaks Company, a corporation owned and controlled by the members of the partnership, of deficiencies asserted against it for the years 1942, 1943 and 1944, claiming that all of the partnership income for each of these years was taxable to the corporation rather than to the partners.

On March 8, 1948, Scharpf paid the asserted deficiency by applying the total credit for overassessments determined for Scharpf's wife together with a cash payment for the balance. This payment was accompanied by a letter dated March 6, 1948, which stated:

"The payment of the deficiency above described and the application of the credits as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision."

On March 13, 1948, Scharpf filed with the then Collector of Internal Revenue a proper and timely claim for refund. The reason set forth by the taxpayer for the allowance of his claim was that:

“In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final determination had as to the taxation of the income of this taxpayer.”

On July 20, 1950, the United States Court of Appeals for the Ninth Circuit held that The Tax Court was in error in sustaining the Commissioner's deficiency assessments against the corporation. *Twin Oaks Co. v. Commissioner*, 183 F. 2d 385.

On February 16, 1951, taxpayer filed a claim for refund for the year 1944, seeking to amend his refund claim for that year which he had previously filed on March 12, 1948, upon which the Commis-

sioner had taken no action. The statement attached to this refund claim was as follows:

“On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

“In entering into the said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

“The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

“This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less overassessment determined to be due on such ground to Eva M. Scharpf.”

Louis Scharpf died on May 10, 1952. Thereafter, the present plaintiffs received a notice of adjustment of decedent's income tax liability for the year 1944, in which it was determined that there had been an overpayment of decedent's income tax for that year in the sum of \$4,006.20 plus interest in the amount of \$711.73. However, the Commissioner allowed a refund of only \$122.55, the amount paid by decedent on account of such tax within two years prior to February 16, 1951. This action was based upon the Commissioner's determination (1) that the refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of the exact basis therefor,¹ and (2) the refund claim filed February 16, 1951, although apprising the Commissioner of the exact basis therefor, was not timely and could not be considered as an amendment of the first refund claim.

Plaintiffs received statutory notices of disallow-

¹The applicable statutes and regulations are: Internal Revenue Code of 1939, Section 322 (b) and Section 3772; 26 U.S.C., 1952 ed., Section 322 and Section 3772; Treasury Relations 111, Sections 29.322-3 and -4.

ance of both the original and the amended refund claims on October 19, 1954.

Plaintiff contends that (1) Scharpf, in his original claim, was requesting that his 1944 tax matters be held in abeyance pending the outcome of the corporation's litigation in which the family partnership was indirectly involved; (2) the refund claim filed on February 16, 1951, was a proper and timely amendment of the original claim because the family partnership issue in the 1951 claim would have been discovered by an investigation of the original claim; (3) the exhibits introduced in The Tax Court trial involving the corporation disclose that the Commissioner was aware of the exact basis of the original refund claim and constitute amendments of the original claim; (4) the statements in the March 6, 1948, letter constitute an informal refund claim; and (5) the Commissioner waived the requirements as to the form and content of the refund claim.

There is no merit to plaintiff's contentions.

A taxpayer cannot recover in court on a ground different from that asserted in the claim for refund, unless there is some action of the Commissioner which amounts to a waiver or estoppel.

The Commissioner completed his investigation of Scharpf's tax return prior to the filing of the original claim and had determined that:

- (a) Scharpf's wife was not an actual or bona fide member of the partnership and that,

therefore, her partnership income was taxable to Scharpf; and

(b) All of the partnership income was taxable to the corporation rather than to the partners.

However, Scharpf failed to set forth both grounds in his original claim for refund. The only ground specified was that he would be entitled to a refund of taxes paid by him individually if the Commissioner, on appeal, should prevail in his contention that "all or a substantial portion of the income of * * * [Scharpf] * * * for the year 1944 was the income of" the corporation.

There was no appeal from the disallowance of the family partnership, and the Commissioner, therefore, had a right to assume that complaint as to it was waived. This is not a case where an informal or general claim for refund was later amended by a specific claim. This is a case in which, after the statute of limitations had run, an attempt was made to file a new claim under the guise of an amendment to a prior claim, which, although timely filed, never materialized. Under these circumstances, the new claim is barred by the two-year statute of limitations. *United States v. Andrews, Executrix* (1938), 302 U. S. 517; *United States v. Garbutt Oil Co.* (1938), 302 U. S. 528.

There was no action on the part of the Commissioner of Internal Revenue which constituted a waiver, since the Commissioner is powerless to

waive the substantive requirements of the statute requiring that the claim be presented within a given period of time. *United States v. Garbutt Oil Co.*, supra. The function of the statute, like that of limitations generally, is to give protection against stale demands. *United States v. Memphis Cotton Oil Co.* (1933), 288 U. S. 62, 71.

Defendant is entitled to a judgment of dismissal.

[Endorsed]: Filed December 14, 1956.

[Endorsed]: No. 15605. United States Court of Appeals for the Ninth Circuit. George L. Scharpf and William Fred Scharpf, Executors of the Estate of Louis C. Scharpf, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15,607

In the United States
Court of Appeals
For the Ninth Circuit

F. M. BISTLINE AND ANNE BISTLINE,
Appellants

vs.

UNITED STATES OF AMERICA,
Appelle

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO

BRIEF FOR THE APPELLEE

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FILED
JUN 23 1957

No. 15,607

In the United States
Court of Appeals
For the Ninth Circuit

F. M. BISTLINE AND ANNE BISTLINE,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
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BRIEF FOR THE APPELLEE

I N D E X

	Page
Opinion Below	3
Jurisdiction	3
Question Presented	3
Statute Involved	4
Statement	5
Summary of Argument	6
Argument:	
The District Court correctly held that the gain realized by the taxpayer from the sale of the property involved here during the taxable year should be taxed as ordinary income rather than capital gain	8
A. Statutory provisions involved	9
B. Factors to be considered in determining the issue	10
C. The District Court's decision is supported by the facts	13
D. Errors in taxpayer's contentions	17
Conclusion	19

CITATIONS

CASES:	Page
<i>Bistline v. United States</i> , 145 F. Supp. 802	3
<i>Cohn v. Commissioner</i> , 226 F. 2d 23	10, 11, 12, 13, 18
<i>Ehrman v. Commissioner</i> , 120 F. 2d 607	12, 18
<i>Friend v. Commissioner</i> , 198 F. 2d 285	11
<i>Galena Oaks Corp. v. Scofield</i> , 218 F. 2d 217	10
<i>Gruver v. Commissioner</i> , 142 F. 2d 363	12
<i>Harriss v. Commissioner</i> , 143 F. 2d 279	11
<i>Homann v. Commissioner</i> , 230 F. 2d 671	10
<i>Mauldin v. Commissioner</i> , 195 F. 2d 714	10, 11
<i>Palos Verdes Corp. v. United States</i> , 201 F. 2d 256	11, 12
<i>Richards v. Commissioner</i> , 81 F. 2d 369	11, 12
<i>Rollingwood Corp. v. Commissioner</i> , 190 F. 2d 263	10, 11, 12
<i>Rubino v. Commissioner</i> , 186 F. 2d 304, certiorari denied, 342 U.S. 814	10
<i>Stockton Harbor Indus. Co. v. Commissioner</i> , 216 F. 2d 638, certiorari denied, 349 U.S. 904	10, 11, 12, 18
<i>United States v. Gypsum Co.</i> , 333 U.S. 364, rehearing denied, 333 U.S. 869	11

CITATIONS

CASES:	Page
<i>Welch v. Solomon</i> , 99 F. 2d 41	12, 18
<i>Williamson v. Commissioner</i> , 201 F. 2d 564	10
STATUTE:	
Internal Revenue Code of 1939, Sec. 117 (26 U.S.C. 1952 ed., Sec. 117)	3, 4, 5, 9, 10

OPINION BELOW

The memorandum opinion of the District Court (R. 16-22) is reported at 145 F. Supp. 802.

JURISDICTION

Appellants filed their income tax return for 1948 on or before March 15, 1949, and thereafter the Commissioner assessed an additional tax with interest (R. 23.) After payment of such sum, appellants duly filed a claim for refund on February 14, 1952. This claim was disallowed on April 8, 1953, and a suit for refund was instituted by the filing of a complaint on March 7, 1955. (R. 3-12.) An answer was filed on behalf of the United States on May 9, 1955. (R. 13-15). After the hearing, the District Court decided one issue for the appellants and one for the United States and thus entered judgment allowing the appellants to recover \$122.04. (R. 16-27.)

QUESTION PRESENTED

Whether the District Court correctly held that the property sold by taxpayer 1/ in the taxable year 1948 had been held primarily for sale to customers in the ordinary course of his business within the meaning of Section 117 of the 1939 Internal Revenue Code and that, accordingly, the profit from such sale should be taxed as ordinary income rather than as capital gain.

1/ Appellant, F. M. Bistline's wife Anne is an interested party because of the filing of a joint return of community income for the taxable year but, for convenience, reference will hereinafter be made only to the appellant F. M. Bistline, who will be called the taxpayer.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAIN AND LOSSES.

(a) [As amended by Section 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798].

Definitions.—As used in this chapter—

(1) *Capital assets.*—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * * or * * * real property used in the trade or business of the taxpayer;

* * * *

(j) [As added by Section 151(b) of the Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the trade or business” means * * * real property used in the trade or business, held for more than 6 months, which is not * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property

used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

* * * *

(26 U. S. C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts as found by the District Court are as follows (R. 22-24) :

F. M. Bistline and Anne Bistline, the taxpayers here, are husband and wife and are residents of Pocatello, Idaho. They filed a joint income tax return for 1948. (R. 22.)

The profit realized from the sale of certain real estate was reported on taxpayers' income tax returns as long-term capital gains but the Commissioner determined that these profits were taxable as ordinary income and assessed and collected additional income taxes for these years. (R. 22-23.)

Mr. Bistline (hereinafter called the taxpayer, see footnote 1, *supra*) is an attorney and has maintained his own law office since 1923. The net income earned from his legal practice in 1946, was \$860 and in 1947 was \$934. (R. 23.)

In 15 separate transactions during 1946, taxpayer sold 34 vacant lots for a net profit of \$10,950.26. In 7 transactions during 1947, he sold 10 vacant lots and a 51.03-acre tract of land for a

net profit of \$9,033; and in 12 transactions during 1948, he sold 54 vacant lots and a tract of land for a net profit of \$12,291.74. (R. 23.)

During the past twenty years, taxpayer purchased large numbers of vacant lots and other real estate with the intention of selling them at a profit to any prospective purchaser; and also during that period, he frequently and continuously sold a substantial number of vacant lots and other real estate. (R. 23.)

Taxpayer was engaged in the real estate business during 1946, 1947 and 1948, and the properties he sold during these three years were held by him primarily for sale to customers in the ordinary course of his real estate business. (R. 23-24.)

The District Court accordingly held that the gain realized from such sales was taxable as ordinary income for federal tax purposes. (R. 25.)

SUMMARY OF ARGUMENT

By taxpayer's failure to include in this appeal any question as to the sales of property made in 1946 and 1947 or any of the sales made in 1948, except that to Westvaco, he necessarily admits the correctness of the District Court's conclusion that all of these sales, with the one exception just referred to, involved property which was being held primarily for sale to customers in the ordinary course of his real estate business and also admits that the gain from such sales, with the exception mentioned, is taxable as ordinary income. There is no reason to treat the sale to Westvaco any differently than the other sales.

Under the applicable statutory provisions, gain

from sales of property which is being held primarily for sale to customers in the ordinary course of the trade or business is taxable as ordinary income. In contending that the tract which was sold to Westvaco was not so held, taxpayer asserts that such tract was used in farming and that such fact brings the case within the statutory provision which allows gain from property used in a trade or business to be treated as capital gain. We do not agree that such provision is applicable here and neither did the District Court. The statutory definition of property used in the trade or business specifically excludes property held primarily for sale to customers in the ordinary course of the trade or business and the question of whether property is so held is a question of fact. Thus, the burden of proving that the tract which was sold to Westvaco was not held primarily for sale was on the taxpayer and the District Court has held that he did not meet his burden of proof.

In reaching its decision the District Court applied tests which have been repeatedly approved and applied by this and other courts in cases involving similar facts, and its decision is amply supported by the facts. The record shows that the land which was sold to Westvaco was a part of a large tract and that when such sale was made about one-half of the tract had already been sold to various persons. Furthermore, no farming had ever been done on the parcel acquired by Westvaco, and taxpayer's co-owner of this tract testified that any property they held was for sale if the price offered was satisfactory. When such evidence is considered with that showing the long period during which the taxpayer has been in the real estate business, we sub-

mit it is evident that the District Court has reached a correct decision.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE GAIN REALIZED BY THE TAXPAYER FROM THE SALE OF THE PROPERTY INVOLVED HERE DURING THE TAXABLE YEAR SHOULD BE TAXED AS ORDINARY INCOME RATHER THAN CAPITAL GAIN.

Taxpayer has appealed only from that part of the judgment of the District Court related to the sale of land to the Westvaco Chemical Company (See R. 27-28, 29-30, 48) and asserts in his brief (p. 6) that the only question involved is whether that sale is entitled to long term capital gain tax treatment. In limiting his appeal in this way, taxpayer is of course conceding the correctness of the District Court's decision as to all of the sales in this case except the one just referred to. In other words, taxpayer now necessarily admits the correctness of the District Court's conclusions that he was engaged in the real estate business during 1946, 1947 and 1948, that all of the property sold by him in 1946 and 1947 and all of the property sold by him in 1948 (except the one piece of land sold to Westvaco) was held primarily for sale to customers in the ordinary course of his real estate business, and that the gain from such sales (with the exception mentioned) is taxable as ordinary income for federal income tax purposes. (R. 23-25.) It is important to note the extent of these admissions for they have a bearing on the question which taxpayer is raising on this

appeal. This will be pointed out more specifically when we discuss the facts and show that the sale to Westvaco should be treated no differently than the other transactions which taxpayer now agrees (by his failure to seek review of the District Court's decision concerning them) resulted in gain taxable as ordinary income.

A. *Statutory provisons involved*

In objecting to the District Court's decision in so far as it applies to the land sold to Westvaco, the taxpayer argues, in substance, that such land was a capital asset which had been used in the business of farming and livestock raising, and that, in computing the tax on the gain realized from such sales, he is entitled to the preferential treatment allowed in Section 117 of the Internal Revenue Code of 1939, *supra*, but we do not agree. Section 117(a) defines capital assets as "property held by the taxpayer" but its scope is definitely limited by provisions therein which expressly exclude several items from that broad definition. Among these exclusions is—

property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *.

From the foregoing provision, it is evident that if the property which a taxpayer sells is held as indicated therein, the gain realized on the sale cannot be treated as a capital gain but must be taxed as ordinary income.

It will also be seen that Section 117(a) (1) (B), *supra*, specifically indicates that real property used

in the trade or business is not to be included with those assets known as "capital assets". Section 117(j) (2), *supra*, does allow gains from the sale of such property (with certain qualifying provisions not material here) to be treated as gain from the sale of a capital asset within the meaning of Section 117(a), and taxpayer obviously relies on Section 117(j) (2). But taxpayer is in error as he does not correctly interpret Section 117(j) (1) which, in defining "property used in trade or business" specifically excludes "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." Thus, when the property is so held, as the District Court found was true of the Westvaco tract in this case, Section 117(j) (2) is not applicable and any gain from the sale of such property must be treated as ordinary income.

B. *Factors to be considered in determining
the issue*

It has been repeatedly held that the issue here is not only a question of ultimate fact but that the judgment of the District Court should be affirmed unless clearly erroneous. *Homann v. Commissioner*, 230 F. 2d 671 (C.A. 9th); *Cohn v. Commissioner*, 226 F. 2d 23 (C.A. 9th); *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217 (C.A. 5th); *Stockton Harbor Indus. Co. v. Commissioner*, 216 F. 2d 638 (C.A. 9th), certiorari denied, 349 U.S. 904; *Williamson v. Commissioner*, 201 F. 2d 564 (C.A. 4th); *Mauldin v. Commissioner*, 195 F. 2d 714 (C.A. 10th), *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263 (C.A. 9th); *Rubino v. Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814; also see

United States v. Gypsum Co., 333 U.S. 364, rehearing denied, 333 U.S. 869.

Consequently, as the issue here is essentially one of fact, its determination necessarily depends on the circumstances in each case but, before discussing the facts, we wish to point out certain factors which were relied on as tests in the above cases, as well as in many others, for determining the status of property in similar cases and which should be considered in reaching a decision here. Obviously, no one factor is controlling but among those which have been considered important are (1) the purpose for which the property has been acquired, (2) the activities of the taxpayer and those acting in his behalf or under his direction, (3) the continuity and frequency of sales as distinguished from isolated transactions, and (4) any other facts indicating that the sale or transaction was in furtherance of the taxpayer's occupation. *Cohn v. Commissioner*, *supra*; *Stockton Harbor Indus. Co. v. Commissioner*, *supra*; *Palos Verdes Corp. v. United States*, 201 F. 2d 256 (C.A. 9th); *Harriss v. Commissioner*, 143 F. 2d 279 (C.A. 2d); *Richards v. Commissioner*, 81 F. 2d 369 (C.A. 9th.)

As taxpayer here appears to take the position that the land sold to Westvaco was originally acquired for farming, it should be noted that the original purpose is not considered as important as the purpose for which the property is being held just prior to sale. *Rollingwood Corp. v. Commissioner*, *supra*, p. 266; *Mauldin v. Commissioner*, *supra*; *Friend v. Commissioner*, 198 F. 2d 285, 288 (C.A. 10th). However, the underlying reasons for a taxpayer's entering into the business of selling real estate are

not material. In other words, whether a taxpayer enters into such business by choice or is forced into it for some reason, the essential thing to note is whether the taxpayer has resorted to a method of disposing of his property which has made it available to customers in the ordinary course of a real estate business. If so, the gain from the sales of such property must be treated as ordinary gain. *Palos Verdes v. United States*, *supra*, p. 259; *Gruver v. Commissioner*, 142 F. 2d 363 (C.A. 4th); *Ehrman v. Commissioner*, 120 F. 2d 607 (C.A. 9th.)

Of course during the time that a taxpayer is holding property, it may be used in some way so as to produce revenue. Thus, as this Court has held, buildings may be rented or land may be used for farming and at the same time also be held for sale. See *Stockton Harbor Indus. Co. v. Commissioner*, *supra*, p. 654; *Cohn v. Commissioner*, *supra*; *Richards v. Commissioner*, *supra*. Moreover, the taxpayer does not have to be a licensed real estate dealer nor does he even have to engage personally in the business of selling since the necessary work can be done through agents. As this Court has held, the personal attention which a taxpayer gives to a business is not decisive as to whether a resulting profit is ordinary income or capital gain. *Welch v. Solomon*, 99 F. 2d 41, 43. Also see *Ehrman v. Commissioner*, *supra*. In *Rollingwood v. Commissioner*, *supra*, this Court pointed out that most of the cases dealing with the problem of whether property is held primarily for sale to customers in the ordinary course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. In considering that

question in connection with the facts involved there, this Court then stated (pp. 266-267) :

The capital gains provisions are remedial provisions. Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is sale.

C. *The District Court's decision is supported by the facts*

As the District Court properly held (R. 21), the taxpayer has the burden of proving that the real estate which he sold was held primarily for investment rather than primarily for sale. *Cohn v. Commissoiner, supra*, p. 24. The District Court also correctly decided that the taxpayer has not met that burden. Moreover, as we have already pointed out, the taxpayer now necessarily concedes that he has not met such burden as to the property sold in 1946 and 1947, nor the property sold in 1948 with the exception of that sold to the Westvaco corporation.

The District Court found, and taxpayer does not deny, that taxpayer purchased large numbers of vacant lots and other real estate during the past twenty years, that during such period he has frequently and continuously sold a substantial num-

ber of vacant lots and other real estate, and that he was engaged in the real estate business during 1946, 1947 and 1948. (R. 23.) The District Court also found that all of such real estate (including the tract sold to Westvaco) was purchased with the intention of selling it at a profit to any prospective purchaser and that all of the property which was sold had been held primarily for sale to customers in the ordinary course of taxpayer's real estate business. (R. 23-24.) These findings are also necessarily admitted by the taxpayer except as they apply to the Westvaco tract. The District Court did not, of course, separate that tract from the other property which he sold, and we submit that under the facts of this case it should not be separated.

The record shows that the land involved in this appeal was part of a 3000 acre tract which is located in Power County and is known as Michaud Flats. It was purchased in 1937 by taxpayer and Paul Evans, who was also in the real estate business. Between the time that such purchase was made and the sale of 210 acres therefrom to Westvaco, taxpayer and Evans made the following sales from the same tract of land: (R. 18, 31-33, 37, 39-40.)

- (1) One sale of 80 acres to the city of Pocatello,
- (2) One sale of 160 acres to the Indian Service,
- (3) One sale, by condemnation, of 903 acres to the U. S. Air Force,
- (4) 2 sales of 40 acres each to Jack Simplot.

As to the particular sale involved here, the record shows that when taxpayer was approached about such sale, he told the purchaser, without any hesitation or apparent unwillingness to consider a sale,

that he would be ready to begin negotiations for the sale upon his return from a trip to Tennessee; and upon his return, he and Evans decided, after various conferences with the purchaser, to make the sale. In attempting to explain their readiness to make that sale, as well as the others listed above, taxpayer testified that, while it had always been their plan to hold the Michaud Flats, they were willing to make a sale when it was in the public interest to do so. (R. 33-35.)

Taxpayer cites such testimony as proof that the land involved here was not held for sale. He also calls attention to Evans' testimony that he had never placed such land in the market with a view to selling it and that he had intended to keep it for farming. (R. 36-37.) But there is other testimony which taxpayer does not refer to and which shows a different intention, and the District Court, after hearing the witnesses and weighing all of their statements, considered this other testimony to be controlling.

The substance of the other testimony to which we refer is that all of the property which Evans and taxpayer purchased jointly (which includes the land involved here) was in fact held for sale "If the price was satisfactory". (R. 18.) In elaborating on this, Evans testified (R. 41-42) :

My answer to your question as to whether or not it is right that I thought I could sell it for a profit, *my answer is that anything I have I would sell for a profit including the Michaud Flats, if I wanted to.* * * * As to whether or not that is exactly why I decided to sell to Westvaco, my answer is yes, if the price is right anything I have is for sale. * * * I bought some other

properties with F. M. Bistline in Bannock County and Power County and *I guess that my testimony that all of this was held for sale if the price was satisfactory would apply to all these properties.* (Italics supplied.)

As to the farming operations to which taxpayer refers the record shows that prior to the purchase by taxpayer and Evans of the Michaud Flats, the latter had owned a parcel of land in the vicinity and had used such land for grazing livestock. The record is not clear as to when Evans began using any part of the Michaud Flats for farming or grazing. Neither is it shown to what extent the land was so used. Taxpayer did testify that he never had any interest in the livestock affairs but that there was a 200 acre parcel in this tract of land that he and Evans had been farming since 1945. The record also shows that some effort has been made, principally it appears by Evans, to get water on this tract by drilling wells or by irrigation. (R. 31-32.) But it should be noted that the parcel which was sold to Westvaco had never been used for farming. As to this, Evans testified that the land sold to Westvaco was not only on the other side of the highway from that allegedly used for farming and/or grazing and was located some distance away from the latter but he also explained, as to the Westvaco tract, that "We didn't have water there for farming at that time. We never did dry farm the piece sold to Westvaco". (R.40-41.)

Of course land can be farmed and at the same time also be held primarily for sale to customers in the ordinary course of a real estate business. But we submit that in the instant case, the evidence shows

that the piece of land involved here had not been used for farming, as taxpayer contends, and it also appears that there was very little farming done on any portion of the Michaud Flats of which the land here was a part. Under such circumstances, taxpayer is in error in contending that the Westvaco tract was an integral part of a farming unit. But even if it were, we submit that in view of the evidence here, including that pertaining to taxpayer's real estate business and other transactions, the District Court was certainly warranted in finding that the Westvaco tract had been held primarily for sale and not for an investment.

D. Errors in taxpayer's contentions

Taxpayer has cited a large number of cases but as the question presented here is essentially one of fact, and the decisions of this Court and other courts, cited above, state the tests which have been applied in similar cases, we do not consider it necessary to discuss the cases on which taxpayer relies. We also believe that the cases we have cited, and our discussion of them, answer taxpayer's contentions. However, we also wish to point out certain errors on taxpayer's part.

It is taxpayer's first contention (Br. 13-16) that where real property is used in trade or business for more than 6 months it cannot be held primarily for sale to customers in the ordinary course of business. In other words, taxpayer contends that property "must fall into one category or the other". (Br. 14). But that is, of course, not a correct interpretation of the law. As we have pointed out, property is frequently used in what may be called a business

not connected with the selling of real estate and yet is held *primarily* for sale. This happens when as in *Cohn v. Commissioner, supra*, buildings are rented pending their sale, and as in *Stockton Harbor Indus. Co. v. Commissioner, supra*, where land was farmed pending the sale. In both cases, the gain from the sales which were made therein was held to be ordinary income because during the period prior to such sales, the property there was being held primarily for sale although it was also being used at the same time for the purposes indicated.

The taxpayer's second contention is that a taxpayer in the real estate business may also hold property as an investment and that profit from a sale of such property would be capital gain. (Br. 17-18.) We do not deny that this may be done but the obvious answer is that this was not what was done here. As the District Court pointed out, the taxpayer had the burden of proving that he had held the Westvaco tract merely as an investment but the evidence shows that it, like all the other property, was held primarily for sale.

The taxpayer's third and fourth contentions are, in substance, that since the sale here was not solicited by the owners of the land and was made with little activity on the taxpayer's part, the gain therefrom should be treated as gain from the sale of a capital asset. (Br. 18-20.) But, as this Court has held, the personal activity of the owner of the property which is sold is not a test to be applied in such a case as this. *Welch v. Solomon, supra*; *Ehrman v. Commissioner, supra*. The essential test is whether the property has been held primarily for sale to any customer in the ordinary course of the taxpayer's

business, and under the facts of this case, it is plain that the property here was so held.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1957

No. 15607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. M. BISTLINE and ANNE BISTLINE,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Brief of Appellant

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TOPICAL INDEX

	Page
Jurisdiction	1
Statement of Case	1
Question Involved	6
Specification of Error	6
Summary of Argument	6
Federal Statutes Involved	11
Argument	12
Conclusion	21

TABLE OF AUTHORITIES CITED

	Page
Boomhower vs. United States, 74 F. Supp. 997.....	11
Burkhard Investment Co., vs. U. S. 100 F. 2d 642.....	8
Camp vs. Murray, 226 F. 2d 931.....	9
Collin vs. U. S. 57 F. Supp. 217.....	9
Delsing vs. U. S. 186 F. 2d 59.....	8
Dunlop vs. Oldham Lumber Co., 178 F. 2d 781.....	9
Ellis vs. Com'r., 13 TCM 15.....	10
Fahs vs. Crawford, 161 F. 2d 315.....	10
Farry vs. C. I. R., 13 TC 8.....	8, 17
Frieda E. J. Farley, 7 TC 198.....	8, 10

Goldberg vs. C. I. R., 223 F. 2d. 709.	8, 17
Guthrie vs. Jones, 72 F. Supp. 784.	10
Harriss vs. Com'r., 143 F. 2d 279.	9
Hebenstreit vs. U. S., 55-2 USTC p. 9571.	9
Hutchinson vs. Com'r., 8 TCM 597.	8
Irrgang vs. Fahs 94 F. Supp. 206.	7
E. R. Fenimore Johnson, 19 TC 93.	9
Jones vs. C. I. R., 1 TCM 816.	8, 17
Kleberg Estate vs. Com'r., 5 TCM 858.	10
Lobello vs. Dunlap, 210 F. 2d 465.	8, 17
Minnie S. Loewenberg vs. Com'r., 7 TCM 702.	10
McConkey vs. U. S., 130 F. Supp. 621.	9
McCoy vs. C. I. R., 192 2d. 486.	7
McKay v. Bowers, 53-2 USTC. p. 9535.	11
McGah vs. Com'r. Int. Rev. 210 F. 2d. 769.	8
Est. of Douglas S. Mackall vs. Com'r., 3 TCM 701.	10
Malouf vs. Ridell, 52-1 USTC 1, 9296.	8, 17
Martin vs. U. S., 119 F. Supp. 468.	9
Miller vs. Com'r., 20 BTA 230.	8, 17
Owen vs. C. I. R., 192 F. 2d 1006.	7
Ross vs. Com'r. Int. Rev., 227 F. 2d 265.	11
The Adam Schantz, Sr., Corp. vs. Com'r., 11 TCM 424.	7

Smith vs. Dunn, 224 F. 2d 353.....	9
Sparks vs. U. S., 55 F. Supp. 941.....	11
Storrow vs. U. S. 99 F. Supp. 672.....	10
Three States Lumber Co., vs. Com'r., of Int. Rev., 158 F. 2d 61.....	10
Vaughn vs. Com'r., 7 TCM 288.....	9
Victory Housing No. 2 vs. Com'r., 205 F. 2d 371.....	8
Watson vs. C. I. R., 197 F. 2d 56.....	7

TEXTBOOKS

1956 C. C. H. P. 4729, 801.....	7, 13
---------------------------------	-------

STATUTES

28 U. S. CA., Section 1346; 68 Stat. 589.....	2
28 U. S. CA., Section 7422; 68 A. Stat. 876.....	2
26 U. S. CA Section 117. (1) ; (4) ; (j) (1) (j) (2).....	7, 11, 13, 14

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JURISDICTION

This action is for the recovery of certain income tax paid by appellants to defendant for the year 1948. The Internal Revenue Bureau disallowed certain long term capital gains claimed by appellants in said return and set up a tax deficiency by reason thereof. Appellants paid the taxes so assessed and thereafter filed a claim for refund, which was disallowed, after which appellants filed this suit. These facts appear in appellants' complaint (Tr. page 7).

Federal Statutes conferring jurisdiction are:

28 USCA Sec. 1346; 68 Stat. 589.

28 USCA Sec. 7422; 68A Stat. 876.

STATEMENT OF THE CASE

In 1937 appellants acquired an undivided one-half interest in the Southeast Quarter of Section 12 and the Northeast Quarter of Section 13, Township 6 South, Range 33 E. B. M., in Power County, Idaho. Eleven years later, 1948, they sold 210 acres of this tract to the Westvaco Chemical Corporation for a profit of \$8,719.66. This was reported in their 1948 joint income tax return as a long-term capital gain and tax was paid accordingly on one-half of such net gain.

In 1954 an Internal Revenue Agent examined appellants 1948 return and disallowed the long term capital gain treatment used by them with regard to this property and certain other real estate transactions, and assessed deficiencies against appellants setting up \$4,359.83 additional income by reason of such disallowance with regard to this particular tract. Thereafter appellants paid the tax on same and filed a claim for refund which was denied. Appellants then brought this suit for the recovery of the tax paid on this particular piece of property, together with the other real estate sales of vacant lots made during the same year.

This case was consolidated with two other cases filed by appellants for recovery of taxes paid by reason of dis-

allowance of long term capital gain benefits on certain real estate sales in 1946 and 1947. Consequently the findings of fact, conclusions of law and judgment are with reference to all the items in the three suits (Tr. p. 16). Appellants have elected to appeal only from that part of the judgment denying long term capital gain benefits on the particular parcel described above sold to the Westvaco Chemical Corporation in 1948.

The background of the sale of the 210 acre tract in 1948 to the Westvaco Company is: J. Paul Evans and F. M. Bistline acquired approximately 4000 acres of land lying on the Michaud Flat west of Pocatello about eight to 10 miles on the Fort Hall Indian Reservation in 1937. This property was originally acquired by L. L. Evans, father of J. Paul Evans from the original Indian owners about the year 1915 or 1916. In 1923 all of this property was sold under execution on judgments against L. L. Evans. Thereafter and in 1924 L. L. Evans quit claimed this 210 acre tract and other land to J. Paul Evans who redeemed the same. It was subsequently sold under other judgments against L. L. Evans and was the subject of a law suit involving the validity of such subsequent sale, when Power County offered it at public sale along with property taken for non-payment of taxes. This was in 1937. F. M. Bistline and Evans Investment Company (J. Paul Evans) were the successful bidders for this land, which was included in the approximately 4000 acres mentioned above.

While under the ownership of L. L. Evans he installed

a pumping plant in the Portneuf River for the purpose of irrigating a portion of this 210 acres and the other of the approximately 4000 acres of land on the Fort Hall Reservation owned by him, but never completed the same on account of financial difficulties. In 1932 Congress enacted a law authorizing the extension of the Fort Hall Irrigation Project to cover the Michaud Flats which would have furnished water to a portion of this particular tract.

After Evans and Bistline acquired this and the other land referred to above on the Reservation, they started development of the same by installing pumps, and also working for the irrigation of the same through the Greater Fort Hall Irrigation project with waters from Palisades Dam. From the time that L. L. Evans first acquired this land it was used for the grazing of livestock, and at the time it was sold it was being used by the Evans Investment Company for the grazing of its livestock and was considered as being an integral part of the farming operation of the Evans Investment Company. It had been used by the Evans Investment Company continuously for a great many years before its sale in 1948 for grazing its livestock.

In the Fall of 1947, J. Paul Evans was contacted by representatives of the Westvaco Company, O. R. Baum and O. A. Powers, with regard to the sale of this 210 acres of ground. F. M. Bistline at the time was in the eastern part of the United States. O. R. Baum in a long distance telephone conversation with Bistline at Memphis, Tennessee, called this matter to his attention. On his return to Poca-

tello in the early part of November, Bistline, Evans, Baum and others for Westvaco conferred with regard to this matter, and finally by May of 1948, a sale of this land to the Westvaco Company was completed. Pressures were put on Evans and Bistline to sell this tract because community leaders were anxious to have the Westvaco factory located in the area.

Appellants and Evans on behalf of the Evans Investment Company at no time made any sales of the Michaud Flat land to private individuals, but sales were made in the public interest. They sold 80 acres to the City of Pocatello for Municipal Airport purposes; 160 acres to the Fort Hall Indian Tribe; and 80 acres to Simplot Fertilizer Company, or more correctly to a governmental agency, who in turn sold to Simplot for the Simplot Fertilizer factory.

Appellants and Evans worked diligently to get water on the land and by drilling wells and also on the project of getting water from the Palisades Dam with the hope of getting the land under irrigation, and were not interested in selling any of the land. After completing the sale to Westvaco of the 210 acres, they turned down a further sale of adjoining land for which a written offer was given them at prices higher than that paid for the 210 acres. This was received in evidence as Plaintiff's Exhibit No. 3. This land was not held for sale by appellants nor the Evans Investment Company, but was held for development as irrigated farm land, and was currently being used for grazing at the time of the sale: (Tr. pages 30-35; 36-39).

QUESTION INVOLVED

The only question involved is whether or not the real estate sold to Westvaco Chemical Company by the appellants was entitled to long-term capital gain tax treatment.

This question is raised by the appeal from that part of the judgment denying appellants recovery for the taxes paid by reason of the court holding that it was not entitled to such treatment. Appellants' attack upon the judgment with regard thereto is that the evidence is conclusive that said property was used in trade or business and was held as an investment and the sale thereof entitled to long-term capital gain treatment.

SPECIFICATION OF ERROR

I.

The District Court erred in entering judgment denying appellants the right accorded by the Statutes in such cases made and provided to pay their income tax on one-half of the gain realized by them on a sale during the year 1948 of a parcel of real estate which had been acquired by them in 1937 and referred to in the complaint and described as follows: Interest in tract in Southeast Quarter of Section 12 and the Northeast Quarter of Section 13, Township 6 South, Range 33 E. B. M., and commonly referred to in the evidence as the "Westvaco Sale" for the reason that the evidence in the record is conclusive that said property was

used in trade or business of farming and held as an investment.

SUMMARY OF ARGUMENT

I.

1. The evidence is clear and uncontradicted that the particular tract in question sold to the Westvaco Chemical Corporation was an integral part of a farming unit and therefore falls within the critical language of Section 117 (j) (1) of the Revenue Act in effect in 1948 which defines a capital real estate asset as "real property used in the trade or business held for more than six months" and that it was not property held by the taxpayer primarily for sale to customers in the ordinary course of their trade or business.

26 USCA Section 117 (j) (1) (2) ;

1956 CCH p. 4729. 801;

McCoy vs. C. I. R. 192 F. 2d 486 (1951) (CA 10, Kansas) ;

Watson vs. C. I. R., 197 F. 2d 56 (1952) (CA 9, California) ;

Owen vs. C. I. R., 192 F. 2d 1006 (1951) (CA 5, Florida) ;

Irrgang vs. Fahs 94 F. Supp. 206.

II.

A Taxpayer in the real estate business may hold other property as an investment and capital assets, and profit on the sale of such property will be entitled to long-term capital gain treatment.

Lobello vs. Dunlap, 210 F. 2d, 465;

Goldberg v. C. I. R., 223 F. 2d 709;

Malouf vs. Ridell 52-1 USTC p. 9296;

Farry vs. C. I. R., 13 TC 8;

Jones vs. C. I. R., 1 TCM 816;

Miller vs. Com'r., 20 BTA 230;

Hutchinson vs. Com'r., 8 TCM 597;

Frieda E. J. Farley, 7 TC 196;

Victory Housing No. 2 vs. Com'r., 205 F. 2d
371;

Delsing vs. U. S. 186 F. 2d 59;

McGah vs. Com'r., Int. Rev. 210 F. 2d 769;

Burkhard Investment Co., vs. U. S. 100 F. 2d
642;

Harriss vs. Com'r., 143 F. 2d 279;

Dunlop v. Oldham Lumber Co., 178 F. 2d 781;

Collin vs. U. S. 57 F. Supp. 217;

Vaugh vs. Com'r., 7 TCM 288;

E. R. Fenimore Johnson, 19 TC 93.

III.

Where property is acquired by taxpayer and sales made with little or no activity on his part, the profits realized therefrom are entitled to capital gain treatment.

Camp vs. Murray, 226 F. 2d 931 (1955) (CA 4, Virginia);

Smith vs. Dunn, 224 F. 2d 353, (1955) (CA 5, Georgia);

Martin vs. U. S., 119 F. Supp. 468 (1954) D. Ct. Georgia);

McConkey v. U. S., 130 F. Supp. 621 (1955) (Ct. Claims, Virginia);

Hebenstreit vs. U. S., 55-2 USTC p 9571 (1955) (New Mexico);

The Adam Schantz, Sr. Corp. vs. Com'r., 11 TCM 424 (1952) (Ohio);

Minnie S. Loewenberg vs. Com'r., 7 TCM 702
(1948) (Texas);

Kleberg, Est., of, vs. Com'r., 5 TCM 858;

Ellis v. Com'r., 13 TCM 15 (1954) (South
Carolina);

Three States Lumber Co., vs. Com'r., of Int.
Rev., 158 F. 2d 61 (1946) (CA 7, Arkansas);

Guthries vs. Jones, 72 F. Supp. 784 (1947)
(Oklahoma);

Storow vs. U. S., 99 F. Supp. 672 (1951) (D.
Ct. California);

Frieda E. J. Farley, 7 TC 198 (1946) (Louis-
iana);

Est. of Douglas S. Mackall vs. Com'r., 3 TCM
701 (1944) Virginia.

IV.

Where lawyer taxpayer acquired property and made sales which were unsolicited on his part, the profit made from such sales was income from the sale of a capital asset and entitled to capital gain tax treatment.

Fahs vs. Crawford, 161 F. 2d 315 (1947) (CA
5, Florida);

Boomhower vs. U. S. 74 F. Supp. 997 (1947)
(Iowa) ;

Ross v. Com'r. Int. Rev., 227 F. 2d 265, (1955)
(CA 5, Florida) ;

McKay vs. Bowers, 53-2 USTC p 9535 (1953)
(South Carolina) ;

Sparks vs. U. S., 55 F. Supp. 941 (1944) (D.
Ct., Georgia).

FEDERAL STATUTES INVOLVED

Sec. 117, Title 26. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS: As used in this chapter—

(1) CAPITAL ASSETS.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation * * * or real property used in the trade or business of the taxpayer; * * *

(4) LONG-TERM CAPITAL GAIN.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

(j) (1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—For the purpose of this subsection the term “property used in the trade or business” means property used in the trade or business of a character which is subject to the allowance for depreciation * * * held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would be includible in inventory * * *, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *

(2) GENERAL RULE.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses. * * * . (Immaterial parts omitted as indicated by asterisks) .

ARGUMENT

It is appellant's contention that the 210 acre tract sold by appellants and Evans Investment Company to the Westvaco Chemical Corporation for use as a factory site was an integral part of a farming and livestock raising operation

and as such in trade or business within the meaning of Section 117 (j) (1). They also contend that they held it as an investment.

I.

Real property used for grazing livestock in connection with the trade or business of farming held for more than 6 months is "property used in the trade or business" as defined in Section 117 (j) (1), and on the sale thereof entitled to capital gain treatment.

26 USCA, IRC, Sec. 117 (j) (2) in effect in 1948;

1956 CCH, p 4729. 801.

Cases cited under *SUMMARY OF ARGUMENT*
Numbered 1.

Where real property is used in trade or business for more than 6 months *it cannot be held primarily for sale* to customers in the ordinary course of business or trade by reason of the words "** * * which is not * * **" occurring in said Section 117 (j) (1). Quoting:

"Section 117 (j) (1) * * * the terms "property used in the trade or business" means * * * real property used in the trade or business held for more than 6 months *which is not* * * * (B) property held by the taxpayer primarily for sale to customers in the or-

dinary course of his trade or business * * *'' (Italics ours).

Therefore it must fall into one category or the other. From the plain wording of the statute it cannot be both.

In *McCoy vs. Com'r., Supra*, the Court had this to say with regard to the construction of the statute in this regard:

"The critical language of Section 117 (j) (1) of the Revenue Act of 1946 and 1947 defines a capital real estate asset as 'real property used in the trade or business held for 6 months' * * *. The words 'real property' are without qualification."

This court in *Watson vs. Com'r., Supra*, disagreed with the 10th Circuit with regard to the nature of growing crops but not with regard to the land itself.

We feel that it is not necessary to repeat much of the evidence in support of our contention. We refer the Court to the Transcript pp 30-36, and pp 36-42 the testimony of F. M. Bistline and J. Paul Evans respectively, for a statement as to how this land was acquired, how it was used, what was planned with regard to it and the circumstances of the sale, and do call particular attention to the fact that this land on the Michaud Flat was not for sale.

"It has always been our plan to hold that land and not sell it, however, when it was in the public in-

terest we were willing to make a sale," (F. M. Bistline testimony Tr. p. 33).

"I never did place this property or any of the Michaud property on the market with a view of selling it, I have done considerable developing of that property out there. I put down the irrigation wells, and irrigated some 300 to 400 acres of land. The first well was put in in 1940 or 1941. The one on the west side of the tract next to the airbase, east of the airbase was put in 1944, and I put another one down in 1948 on the south side, and then about two weeks ago I put another one down on the south side of the tract . . . I intended to keep this property to farm it." (J. Paul Evans Testimony Tr. p. 37).

Also attention is called to Exhibit 3,—the offer made by the Westvaco Company for additional land which was rejected by appellants and Evans.

The trial court apparently got the idea that this parcel together with the other Michaud land was purchased by Evans and appellants as delinquent tax property. (Memorandum decision Tr. p. 18). "In 1937 F. M. Bistline and Paul Evans * * * purchased 3000 acres of land in the 'Michaud Flats' area at a Power County Tax sale." This was not the case. This land was owned by Power County through execution sale, subject to a lawsuit by Evans contesting its validity, at the time of the sale.

"These law suits were brought by the County on account of depository funds signed by these directors (of the First National Bank of American Falls) and Mr. Evans. This suit was pending in the Circuit Court of Appeals and the County was holding a tax sale, and they put that property up for sale along with the tax sale of tax lands." (F. M. Bistline Testimony Tr. p. 31).

This land was redeemed once (Tr. pp 30-31). It had been in the Evans family ownership for over 40 years, except when under execution sale, which was under attack (Tr. 30, 36).

"I recall the plans we had with regard to the Michaud property. I planned on farming it and grazing it. I was running livestock at that time. I was using this for grazing and had been using it for grazing since we acquired it." (J. Paul Evans, Testimony Tr. p. 36).

"There was an authorization for an irrigation system on that through the Indian Affairs Department in 1932 to put that under water" (F. M. Bistline testimony p. 32, 33. Transcript).

The owners were working to get water from the Palisades dam (Tr. pp. 31). (Note: This dam has since been completed and work is in progress for putting the Michaud Flats under water as the Greater Fort Hall Indian Reservation Project).

II.

A taxpayer in the real estate business may hold other property as an investment and capital asset, and profit on the sale of such property will be entitled to capital gain treatment.

Lobello vs. Dunlap, 210 F. 2d 465 (1954-CA 5, Texas) ;

Goldberg vs. Com'r 223 F. 2d 709 (1955-CA 5, Texas) ;

Malouf vs. Ridell, 52-1 USTC p. 9296 (1952-California) ;

Farry vs. Com'r., 13 TC (1949-Texas) ;

Jones vs. Com'r., 1 TCM 816 (1943-Virginia) ;

Miller vs. Com'r.. 20 BTA (1930-Michigan).

The only one of these cases arising within the jurisdiction of this court is *Malouf vs. Riddell*, 52-1 USTC p. 9296, a California case decided in 1952. Here taxpayer was a partner in the Malouf Realty Company. He sold certain real estate held by him for investment purposes to the Burbank Unified School District and contended that said sale was the sale of a capital assets and that the profit therefrom should be treated as a capital gain. The jury so held. It was instructed by the Court that dealers in real estate are permit-

ted under the law to hold real estate on their own accounts as capital assets and for investment purposes.

In addition to the cases immediately cited we refer the Court to the cases cited under paragraph Numbered 2. of the *SUMMARY OF ARGUMENT*.

III.

Where property is acquired by taxpayer and sales made with little or no activity on his part, the profits realized therefrom are entitled to capital gain treatment.

We have cited a long list of cases on this point under SUMMARY OF ARGUMENT paragraph numbered 3, and refer the court thereto.

We particularly call attention to the fact that the evidence shows that neither appellants nor Evans had given any thought or consideration whatsoever to selling this particular parcel of ground. The sale was in no way sought or solicited by them. On the other hand the purchasers came to them after they had looked the ground over and decided that it was suitable for their purposes as a chemical plant. The owners had no fixed price. The first approach made to the owners was in November 1947. The sale was not consummated until May 1948. It was wanted for a special purpose. Had it been offered for sale in the ordinary course of business as a real estate dealer it would have had to have been offered as farm land. Had it been condemned it would have had to take a value as grazing land, according to the rules of evidence

in determining market value for that was the use to which it was being put.

IV.

Where lawyer taxpayer acquired property and made sales which were unsolicited on his part, the profit made from such sales was income from the sale of a capital asset and entitled to capital gain treatment.

We refer to the cases cited under SUMMARY OF ARGUMENT paragraph numbered 4 on this point. They are largely cumulative of the authority set forth under point 3 above, but we feel that a reading of these cases will add light to the consideration of this case.

Before concluding our argument we desire to submit to the court additional authority in support of our position by way of informing the court as to the position recently taken by the Bureau of Internal Revenue with regard to the 80 acres sold by appellants and Evans to Roy Lindley, testimony concerning same appearing in the transcript at page 34 as follows: (F. M. Bistline testifying).

“Since the sale of this piece of property to Westvaco, which was in the public interest, we have made one sale of a parcel of this land. This one sale was made in 1953. In 1953 Mr. Evans and I had been contemplating bringing another 80 acres under cultivation which cornered on the 200 we had in cultiva-

tion. However, Mr. Lindley had just put in a pressure system on the land which was immediately west of it, and put in a main line of his pressure system right over to the edge of it. He came to us and talked us out of going ahead with it. He said he would like to buy it, and finally got the price where we figured it was better to sell to him than for us to go and develop the land and we sold it to him."

We quote from the report received from the Assistant Regional Commissioner, Appellate, San Francisco Region, 504 Dooly Building, Salt Lake City, Utah, under date of May 6, 1957 as follows:

"ADJUSTMENTS TO NET INCOME—Taxable year 1953.

"EXPLANATION OF ADJUSTMENTS (a) and (b). The adjustments made in the Revenue Agent's report, taxing the gain from the sale of a one-half interest in 80 acres of property as ordinary income from business instead of as a long-term capital gain as reported on the return, is reversed."

This land was acquired at the same time, was used for the same purposes as the 210 acres sold to Westvaco. The Internal Revenue Service has recognized the error of its ways. The laws had not been changed regarding such sales between 1948 and 1953.

CONCLUSION

In conclusion we submit that under the law and the evidence of this case that appellants are entitled to a reversal of the judgment with instruction to the court below to enter judgment in favor of the appellants for the recovery of the taxes paid on ordinary gain on the sales of the 210 acre tract of land sold to the Westvaco Chemical Company for a factory site.

Respectfully submitted,

R. Don Bistline,

Beverly B. Bistline,

F. M. Bistline,

ATTORNEYS FOR APPELLANT.

No. 15607

United States
Court of Appeals
for the Ninth Circuit

F. M. BISTLINE and ANNE BISTLINE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division.

FILED

AUG 26 1957

PAUL P. G. EN, C.



No. 15607

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	13
Attorneys, Names and Addresses of	1
Certificate of Clerk	46
Complaint	3
Ex. A—Claim for Refund	8
Findings of Fact and Conclusions of Law	22
Judgment	26
Memorandum Opinion	16
Narrative Statement of Testimony and Proceed- ings	28
Notice of Appeal	27
Statement of Points to Be Relied Upon by Ap- pellant	48

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In the District Court of the United States of America
for the District of Idaho, Eastern Division
1887

F. M. BISTLINE and ANNE BISTLINE, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff alleges:

I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

II.

That at all times hereinafter mentioned the defendant, United States of America, was, and now is, a corporation sovereign and body politic.

III.

That the plaintiffs are now, and at all times hereinafter mentioned, were husband and wife, and filed a joint income tax return for the year 1948.

IV.

That on or before the 15th day of March, 1949, plaintiffs herein filed an income tax return on Form 1040 for the year 1948, in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things that in the calendar year 1948 they disposed of capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

F. M. Bistline, et ux., vs.

Kind of Property	Date Acquired	Date Sold	Sales Price	Cost	Expenses of Sale	Gain
Lots 5, 6, 7, 8, Block 1, Park Addition to Alameda, Bannock County, Idaho	1938	4-14-48	\$ 25.00	\$ 5.00	None	\$ 20.00
Lots 18 & 19, Block 353, Pocatello	1936	4-28-48	100.00	30.00	None	70.00
Interest in tract in SE $\frac{1}{4}$ Sec. 12; and the NE $\frac{1}{4}$ of Sec. 13, T 6 South, Range 33, EBM	1937	5-14-48	9,019.66	300.00	None	8,719.66
One-half int. in S $\frac{1}{2}$, Block 4, Inglenook Acres, Bannock County	1938	10-22-48	2,000.00	100.00	\$200.00	1,700.00
Block 40, Pocatello Townsite, Bannock County, Idaho	1939	5-25-48	900.00	10.00	None	880.00
One-half int., Lots 11, 12, Block 41, Poca- tello	1943	5-25-48	100.00	10.00	None	90.00
Lot 16, Bl. 27, Pocatello	1939	5-13-48	100.00	10.00	None	80.00
One-fourth int. in Lot 13 and N 20' 12, Block 381, Pocatello	1936	1- 3-48	125.00	10.00	25.00	90.00
One-fourth int. S 10' Lot 12, all Lot 11, and N. 10' Lot 12, Block 381, Pocatello	1936	5-21-48	125.00	10.00	25.00	90.00
One-half int. in Lots 1, 2, 13, 12, 14, 15, 16, Block 16, Downey, Bannock County, Idaho	1943	3-19-48	103.58	25.00	10.00	68.58
$\frac{1}{2}$ int. L. 23, 24, Bl. 2, Inglenook Acres	1938	6- 3-48	500.00	150.00	50.00	300.00
$\frac{1}{2}$ int. in N $\frac{1}{2}$ Lot 22, S $\frac{1}{2}$ Lot 23, Block 4,

That in addition to the foregoing the Commissioner included in plaintiffs' 1948 income tax return the following item as a sale of "Property Other than Capital Assets," same being described therein as follows:

Vacant Lots—18 Block 168, Date Acquired: 1940; Date Sold: 1948; Sales Price: \$1,850.00; Cost: \$1,699.46; Gain: \$150.54.

V.

That plaintiffs had a total profit on the sale of said capital assets of \$12,592.82, from which they realized a long term capital gain in the amount of fifty (50%) per cent thereof, to wit, \$6,296.41, which was included in plaintiffs' net return for said year 1948, and all lawful taxes thereon were duly paid.

VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of \$12,592.84 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of his trade or business.

VII.

That thereupon the commissioner assessed an additional tax against the plaintiff on the sum of \$6,296.41, together with interest thereon from March 15, 1949, to the date of payment, to wit, May 31, 1951, at the rate of 6% per annum.

VIII.

That in addition to the above items on which

plaintiffs seek a refund, the plaintiffs deducted from their 1948 income as ordinary and necessary business expense, and for which they claim a refund, the following items.

Tuition—Practicing Law Institute, New York City	\$ 70.00
Books for same and law office.....	70.00
Travel & Hotel—Pocatello, Idaho, to New York City to attend said Practicing Law Institute and Lions International Convention for F. M. Bistline.....	295.20

That said F. M. Bistline, one of the plaintiffs herein, is a practicing lawyer in Pocatello, Idaho, and as such, had under consideration in his office certain matters involving complicated questions of income tax and estate and gift tax matters, and it was necessary for him, in order to properly handle the same; that said expenses were directly connected with and proximately resulted from the practice of his said profession; that the said books referred to above were paper pamphlets of a temporary nature, subject to frequent revision. That said F. M. Bistline is a member of the Lions Club of Pocatello, and the expenses incurred in connection with attending said convention were necessary and ordinary in connection with the furtherance of his profession; that said expenses would have been incurred in connection with the attending of said Practicing Law Institute, even if there had been no Lions convention.

IX.

That thereupon the commissioner assessed an additional tax against the plaintiffs on the sum of \$435.20, together with interest thereon from March 15, 1949, to the date of payment, May 31, 1951, at the rate of 6% per annum.

X.

That said Commissioner assessed an additional tax against the plaintiffs of \$1,768.91, and lawful interest thereon from March 15, 1949, in the amount of \$234.00, making a total of \$2,002.91, paid by plaintiff to the defendant as a result of said erroneous rulings of said Commissioner of Internal Revenue.

XI.

That on February 14, 1952, plaintiff duly filed a claim for refund of said additional tax and interest, a copy of which said claim is hereto annexed and marked "Exhibit A" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

XII.

Plaintiffs allege that said gain of \$12,592.83 was realized from the sale of their community capital assets held more than six months and that they have been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay their income tax on one-half of said gain to wit, \$6,296.41, and that the plaintiffs have been denied

the right accorded by statutes to deduct ordinary and necessary business expenses in the sum of \$435.20, and that by reason thereof the defendant owes these plaintiffs \$1,768.91 for money had and received from the plaintiff on May 31, 1951, together with interest thereon from March 15, 1949, to said May 31, 1951, in the sum of \$234.00, making a total now owing by defendant to plaintiff of \$2,002.91, together with interest thereon at the rate of 6% per annum from May 31, 1951.

Wherefore, Plaintiff prays judgment against the defendant for the sum of \$2,002.91, together with interest thereon at the rate of 6% per annum from May 31, 1951, and such other and further relief as may be proper in the premises.

BISTLINE & BISTLINE,

By /s/ F. M. BISTLINE,

Attorneys for Plaintiffs.

EXHIBIT "A"

Form 843

U. S. Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: (Date received) [Blank].

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Idaho,
County of Bannock—ss.

Name of taxpayer or purchaser of stamps:

F. M. Bistline and Anne Bistline, husband and wife.

Street address:

351 North Garfield Avenue.

City, postal zone number, and State:

Pocatello, Idaho.

1. District in which return was filed: Idaho.

* * *

3. Kind of tax: Income Tax for calendar year 1948.

4. Amount of assessment, \$3,470.30; dates of payment, 3-15-49—5-31-51.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on May 31, 1953.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxable net income for year 1948, on which claimants paid tax—from R.A.R. (Lloyd T. Ralphs), dated February 21, 1950.....	\$16,202.86
---	-------------

Less capital gains from sales of real estate held by taxpayers for more than 6 months, treated as ordinary income on R.A.R. 2-21-50.....	6,308.91
--	----------

Less following expenses of F. M. Bistline disallowed as deductions:

Tuition—Prac. Law Inst., N. Y. \$70.00, Books for same and law office \$70.00.	140.00
Travel & Hotel, Pocatello to N. Y., to attend this Prac. Law. Inst. and Lions International Convention—one half for each.....	295.20

Credited Income	\$ 9,458.75
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Income Tax Paid for 1948..	\$ 3,470.30
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Income Tax as corrected....	1,772.16
-----------------------------	----------

To Be Refunded.....	\$ 1,698.14
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I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the

best of my knowledge and belief is true, correct and complete return.

See attached sheet for reasons.

/s/ F. M. BISTLINE,

/s/ ANNE BISTLINE.

Dated, 19...

Reasons

The sales which the Revenue Agent set up as Ordinary Gain, consisted of vacant lots in Pocatello, Alameda and Downey, Idaho, and one parcel, SE $\frac{1}{4}$, Sec. 12; NE $\frac{1}{4}$, Sec. 13; Sec. 7, T. 6 S., Range 33 E.B.M. All of this property except the rural tract was purchased for investment by taxpayer and wife between 1936 and 1943, when real estate prices were at a low level and made good investments.

Taxpayer F. M. Bistline is an attorney at law and all during 1948 was engaged in the practice of law and was not then and never has been a licensed real estate dealer and in no way attempted to obtain a market for said lots, and did nothing toward improving them or advertising them for sale, as is done with subdivisions.

This Property Was Not Held by Taxpayers or Either of Them for Sale to Customers in the Ordinary Course of Their or His or Her Trade or Business.

The property was purchased for investment in just the same manner as investors buy stocks or bonds and sell them at favorable prices.

Section 117 of the Internal Revenue Code has reference to persons engaged in the real estate business as dealers within the generally accepted meaning of a dealer in real estate, which means, the maintaining of an office and a persistent course of buying, advertising, selling, replacing, etc., and those other incidentals which go to make up a real estate business. None of this was done by taxpayers.

The SE $\frac{1}{4}$, Sec. 12, and NE $\frac{1}{4}$, Sec. 13; Sec. 7, T. 6 S., R. 33 E.B.M., was a piece of farmland consisting of 210 acres, more or less, owned jointly with Evans Investment Company, a corporation, which was purchased in 1937, and was part and parcel of a farming operation of said Evans Investment Company and taxpayers. It is ground that is under the Fort Hall Irrigation Project, for which water is expected from the Palisades Dam, and was sold only for the special purpose of providing a factory site for the Phosphorus Factory of the Westavaco Chemical Company. Had taxpayers not sold this to them, the probabilities are that this site would not have been located at its present location.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

Civil No. 1887

ANSWER

The defendant by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, answers the plaintiffs' complaint as follows:

1. The defendant denies the allegations of paragraph I of the complaint except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiffs.

2. The defendant admits the allegations of paragraph II of the complaint.

3. The defendant admits the allegations of paragraph III of the complaint.

4. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph IV of the complaint except to admit that plaintiffs filed a joint individual income tax return, Form 1040, for the year 1948 with the Collector of Internal Revenue for the District of Idaho, on March 15, 1949.

5. The defendant denies the allegations contained in paragraph V of the complaint.

6. The defendant denies the allegations contained

in paragraph VI of the complaint except to admit that upon examination of the plaintiffs' income tax return for the year 1948 the Commissioner of Internal Revenue determined that income realized by plaintiffs from the sale of certain pieces of real estate was taxable as ordinary income and not as a capital gain.

7. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VII of the complaint.

8. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII of the complaint.

9. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph IX of the complaint.

10. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph X of the complaint, except that it is denied, that any of the Commissioner's rulings were erroneous.

11. The defendant denies the allegations contained in paragraph XI of the complaint except to admit that plaintiffs filed a claim for refund of income taxes for the year 1948 on February 12, 1952, with the Collector of Internal Revenue, District of

Idaho, and that such claim for refund was disallowed on April 18, 1953. Defendant further denies each and every allegation appearing in said claim for refund which is not otherwise expressly admitted in this answer.

12. The defendant denies each and every allegation contained in paragraph XII of the complaint.

Wherefore, the defendant having answered prays that judgment be entered dismissing the plaintiffs' complaint with prejudice, and that the defendant be awarded its costs and other relief which to the Court may seem just and proper.

/s/ JOHN T. HAWLEY,
Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

In the United States District Court for the District
of Idaho, Eastern Division

No. 1885

ANNE BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1886

F. M. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1887

F. M. BISTLINE and ANNE BISTLINE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

The plaintiffs, husband and wife, filed these actions against the United States to recover income taxes which they aver were erroneously assessed and

collected. This Court has jurisdiction to decide these matters. 28 U.S.C.A. § 1346(a)(1).

Two issues are presented here: (1) Were the profits realized by these taxpayers from the sale of real estate properly taxed as ordinary income? (2) Were expenditures incurred by F. M. Bistline in traveling to and attending the Practicing Law Institute in New York City deductible as business expenses?

The taxpayers filed separate income tax returns for the years 1946 and 1947, and a joint return for 1948, in which they reported profits realized from the sale of real estate as long-term capital gains. The Internal Revenue Service reviewed those transactions, determined that during the years in question F. M. Bistline was engaged in the real estate business and held the said property primarily for sale to customers in the ordinary course of his business, and ruled that the gains from such sales constituted ordinary income.

During 1946 F. M. Bistline, in 15 separate transactions, sold 34 vacant lots for a net profit of \$10,950.26. He entered into seven sales in 1947 in which he disposed of 10 vacant lots and a 51.03-acre tract for a net profit of \$9,033. He participated in 12 transactions in 1948 involving the sale of 24 vacant lots, all of Block 40 in the city of Pocatello, Idaho, the south half of Block 4, Inglenook Acres, and a tract of land sold to the Westvaco Corporation, and made a net profit of \$12,291.74. The taxpayer, an at-

torney, has been admitted to practice in Idaho since 1920, and has maintained his own law office since 1923. The net income from his legal practice in 1946 amounted to \$860; in 1947, \$934.

The evidence shows that F. M. Bistline bought and sold substantial tracts of real estate during the past twenty years, both in his own behalf and in conjunction with others, and that he participated in two different "investment pools." In 1936 he and A. Y. Satterfield, a licensed realtor, bought, as co-owners, a number of city lots at county tax sales. Between 1936 and 1946 they made approximately 100 purchases and 100 sales of real property. In 1937 F. M. Bistline and Paul Evans, who is and has been in the real estate business for a number of years, purchased 3,000 acres of land in the "Michaud flats" area at a Power County tax sale. In 1939 they bought 77 acres in Bannock County, which subsequently became known as "Fremont Heights," from the receiver of the Citizens Bank and Trust Company.

Evans testified that all the property which they purchased jointly was held for sale "if the price was satisfactory."

Q: "That property [Fremont Heights] was being held for sale, too, wasn't it?"

A: "Naturally."

Q: "If the price was satisfactory?"

A: "Naturally."

Q: "Just like any of the other property you owned with Mr. Bistline?"

A: "So far as I am concerned anything is for sale if the price is right."

Q: "And you bought quite a bit of other property with him in Bannock County?"

A: "Some properties with him."

Q: "In Bannock County?"

A: "Yes."

Q: "And Power County?"

A: "Yes."

Q: "And your testimony that all this was held for sale if the price was satisfactory would apply to all these properties, wouldn't it?"

A: "I guess it would."

F. M. Bistline also admitted, on cross-examination, that he purchased large numbers of lots at tax sales with the intention of reselling them at a profit.

Q: "Now, in buying these lots would it be fairly correct to say you bought them with the intent to sell them at a profit?"

A: "I bought them with the hope of selling them at a profit."

The Bistline Realty Company, a corporation, was formed in 1937, and F. M. Bistline was elected president. In 1940, when the realty company moved into new quarters, he established his law office in the rear of the premises. His real estate holdings were listed in a card catalogue maintained in the company's office, and the final sales of this property were negotiated in his law office. Rolland H. Smith, then office manager of the realty company, testified as follows:

Q: "And I believe you said sometimes people would come in and inquire about those properties?"

A: "Yes."

Q: "And you told them they were available?"

A: "Yes."

Q: "Wasn't that what you testified to?"

A: "Yes."

Q: "And that is a fact?"

A: "Yes."

On December 31, 1945, F. M. Bistline moved his law office to another building in Pocatello, and sold his interest in the Bistline Realty Company to Smith. The former's real estate holdings continued to be listed in the company's card catalogue.

Property which a taxpayer holds primarily for sale to customers in the ordinary course of his trade or business is expressly excluded from the statutory definition of capital assets. Section 117(a)(1), Internal Revenue Code of 1939, 26 U.S.C.A., § 117(a)(1). "While the purpose for which the property was acquired is of some weight, the ultimate question is the purpose for which the property is held. *Richards vs. C.I.R.*, 9 Cir., 81 F. 2d 369, 106 A.L.R. 249." *Rollingwood Corporation vs. Commissioner*, 9 Cir., 190 F. 2d 263, 266. The facts necessary to create the status of one engaged in a "trade or business" depend primarily on the frequency or continuity of the transactions claimed to result in a "business" status. *Ehrman vs. Commissioner*, 9 Cir., 120 F. 2d 607, 610; *Rollingwood Corporation vs. Commissioner*, *supra*; *Palos Verdes Corp. vs. United States*, 9 Cir.,

201 F. 2d 256, 258-259; Stockton Harbor Industrial Company vs. Commissioner, 9 Cir., 216 F. 2d 638, 650, certiorari denied 349 U.S. 904, 75 S.Ct. 581, 99 L.Ed. 1241.

F. M. Bistline's sales of real estate during 1946, 1947 and 1948 were frequent and continuous. He admitted that he purchased a large number of lots with the purpose of reselling them for a profit. Paul Evans testified that the real estate he and F. M. Bistline purchased jointly was held for sale. Rolland H. Smith stated that the property owned by F. M. Bistline and listed with the Bistline Realty Company was "available" to prospective purchasers.

The plaintiffs have the burden of proving that the real estate sold during the years in question was held primarily for investment rather than primarily for sale. Cohn vs. Commissioner, 9 Cir., 226 F. 2d 22, 24. They have not met that burden. The Internal Revenue Service correctly treated the gains from such sales as ordinary income.

In July, 1948, F. M. Bistline and his wife traveled to New York City, where he enrolled in a two-week course in federal taxation at the Practicing Law Institute. He also attended the Lions Convention while in New York. F. M. Bistline's testimony is that his travel expenses for the trip to New York and his hotel expenses incurred while attending the institute amounted to \$295.20. It is undisputed that his expenditures for tuition and books totaled \$140. Those amounts, in the total sum of \$435.20, were deducti-

ble as business expenses. F. M. Bistline was reimbursed for his expenses incurred on the return trip and consequently such expenditures were not deductible.

Counsel for defendant may prepare findings of fact, conclusions of law and a proposed judgment, serve copies thereof upon counsel for the plaintiffs and submit originals to the Court for its approval.

Dated this 1st day of November, 1956.

/s/ FRED M. TAYLOR,

United States District Judge.

[Endorsed]: Filed November 2, 1956.

[Title of District Court and Cause.]

Nos. 1885, 1886 and 1887

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

1. F. M. Bistline and Anne Bistline, husband and wife, are residents of Pocatello, Idaho.

2. F. M. Bistline and Anne Bistline filed separate income tax returns for the calendar years 1946 and 1947; they filed a joint income tax return for 1948.

3. The profit realized from the sale of certain real estate was reported on plaintiffs' income tax returns as long-term capital gains. After review of

plaintiffs' returns, the Commissioner of Internal Revenue determined that these profits were taxable as ordinary income. The Commissioner accordingly assessed and collected additional income taxes for these years.

4. F. M. Bistline is an attorney at law. He was admitted to practice in Idaho, in 1920, and has maintained his own law office since 1923. The net income earned from his legal practice in 1946, was \$860; in 1947, \$934.

5. In 15 separate transactions during 1946, F. M. Bistline sold 34 vacant lots for a net profit of \$10,950.26.

6. In 7 transactions during 1947, F. M. Bistline sold 10 vacant lots and a 51.03-acre tract of land for a net profit of \$9,033.

7. In 12 transactions during 1948, F. M. Bistline sold 54 vacant lots and a tract of land for a net profit of \$12,291.74.

8. During the past twenty years, F. M. Bistline purchased large numbers of vacant lots and other real estate with the intention of selling them at a profit to any prospective purchaser.

9. During the past twenty years F. M. Bistline has frequently and continuously sold a substantial number of vacant lots and other real estate.

10. F. M. Bistline was engaged in the real estate business during 1946, 1947 and 1948.

11. The properties sold by plaintiffs during 1946, 1947 and 1948 were held by them primarily for sale to customers in the ordinary course of F. M. Bistline's real estate business.

12. F. M. Bistline traveled to New York City in July of 1948, primarily to attend a two-week course in federal taxation at the Practicing Law Institute. His purpose in taking this course was not only to broaden his professional knowledge but also to enable him to handle a tax matter then pending in his office. The total of his non-reimbursed travel expenses for this trip and his hotel expenses while in New York City was \$295.20; his expenses for tuition and books, \$140. These expenses were incurred in the ordinary and necessary course of Mr. Bistline's legal practice.

13. By agreement of the parties, these cases were consolidated for the purposes of trial.

Conclusions of Law

1. The Court has jurisdiction of the parties to and subject matter of this action.

2. Profits realized from the sale of property held primarily for sale to customers in the ordinary course of a trade or business are taxable as ordinary income for federal income tax purposes. Whether property was being held for such purpose is a question of fact largely to be determined by the frequency, continuity and substantiality of the transactions involved. *Ehrman vs. Commissioner*, 120 F. 2d

607 (C.A. 9th); *Rollingwood Corp. vs. Commissioner*, 190 F. 2d 263 (C.A. 9th); *Palos Verdes Corp. vs. United States*, 201 F. 2d 256 (C.A. 9th); *Stockton Harbor Indus. Co. vs. Commissioner*, 216 F. 2d 638 (C.A. 9th), certiorari denied, 349 U.S. 904.

3. The real estate sold by plaintiffs during 1946, 1947 and 1948 was held by them primarily for sale to customers in the ordinary course of their business. The gain realized from these sales was accordingly taxable as ordinary income for federal income tax purposes.

4. The non-reimbursed expenses incurred by F. M. Bistline in attending the Practicing Law Institute in New York City are deductible for income tax purposes.

/s/ FRED M. TAYLOR,
District Judge of the United States District Court
of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed April 11, 1957.

In the United States District Court
for the District of Idaho

Civil No. 1885

ANNE BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1886

F. M. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1887

F. M. BISTLINE and ANNE BISTLINE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

These cases being consolidated for purposes of trial, and plaintiffs having appeared in person by their attorney, Don R. Bistline, and the defendant

having appeared by Arthur L. Biggins, Attorney, Tax Division, Department of Justice, and the Court having considered the evidence, the pleadings, stipulation and briefs filed,

It Is Hereby Ordered and Adjudged that the plaintiffs recover of defendant \$122.04 plus interest as prescribed by law, this being the refund to which they are entitled for deductible expenses incurred when F. M. Bistline attended the Practicing Law Institute in New York City, and that the remainder of plaintiffs' claims are dismissed on the merits with each party to bear his own costs.

Dated at Boise, Idaho, this 10th day of April, 1957.

/s/ FRED M. TAYLOR,

United States District Judge,
for the District of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed April 11, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That F. M. Bistline and Anne Bistline, husband and wife, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on April 10, 1957, denying plaintiffs the right accorded by the

Statutes in such cases made and provided to pay their income tax on one-half of the gain realized by them on a sale during the year 1948 of a parcel of Real Estate which had been acquired by them in 1937 and referred in the complaint and described as follows: "Interest in tract in Southeast quarter Section 12 and the Northeast quarter of Section 13, Township 6 South, Range 33 E.B.M."

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

No. 1887—E

NARRATIVE STATEMENT OF TESTIMONY AND PROCEEDINGS

The above-entitled cause came on regularly for trial on the 3rd day of May, 1956, upon the issues framed by plaintiffs' complaint and defendant's answer, R. Don Bistline, Beverly B. Bistline and F. M. Bistline appearing as counsel for plaintiffs-appellants and Arthur L. Biggins. appearing as counsel for respondent.

Plaintiff's Case in Chief

F. M. Bistline, plaintiff, called as a witness, being first duly sworn, testified as follows:

I am an attorney-at-law, and one of the plaintiffs in this case. My wife is the other plaintiff. I have bought and sold various types of real estate in and around Pocatello, Idaho. The purchases were particularly at tax sales beginning with the year 1936 through 1943, and the sales continued up to the present time. Defendant's Exhibits 2 and 5 are summaries of the recordings of various real estate transactions in the office of the County Recorder of Bannock County, Idaho, in which transactions plaintiffs were participants.

Exhibits 2 and 5 admitted by stipulation of the parties.

(Note: The trial court held that the plaintiffs held all of said property primarily for sale to customers in the ordinary course of their business and that the profits on the same were taxable as ordinary gain. There is no contest on this appeal as to all of the transactions involved in the three consolidated cases, except the tract described as "Interest in tract in SE $\frac{1}{4}$, Section, and the NE $\frac{1}{4}$ of Section 13, T. 6 South, Range 33 E.B.M." The appeal is taken solely on the sale of this last-described parcel of real estate. For this reason further detailed testimony is not included as plaintiffs concede the correctness of the trial court on all tracts except the above-described one—the appeal being only from that part of the judgment denying plaintiffs long-term capital gain benefits on said parcel. Reference to all other tracts and parcels is

therefore omitted from this narrative statement, and the statement is confined to evidence relating to said tract.)

Mr. Bistline, witness, continuing:

I was the owner of an undivided interest with J. Paul Evans in certain property which we sold to the Westvaco Company, in 1948 (described in the complaint as "Interest in tract SE $\frac{1}{4}$, Section 12, and the NE $\frac{1}{4}$ of Section 13, T. 6 South, Range 33 E.B.M.")

The circumstances of acquiring said tract were: Paul Evans' father, L. L. Evans, about the year 1915 and subsequent years on up to about 1919, purchased from competent Indians about 5,000 acres of ground on the Fort Hall Indian Reservation with the idea in mind of putting it under irrigation. He had gone so far as to put in the main ditch and his pumping plant. The main ditch itself went over this particular parcel. He got everything set to go. He was planning on buying water out of the American Falls Reservoir I understand, but in 1923 he met with financial reversals. He was president and a large stockholder in the First National Bank of American Falls. The bank failed and a very large number of lawsuits were brought against Mr. Evans and the stockholders and directors in that bank and resulting in judgments and that land was sold under execution.

In 1926 J. Paul Evans and his father came to my office. I believe that they had made a redemption of this land, and immediately after they had redeemed

it, it was noticed up for sale again on another sale. They came to me, and were going to redeem from this second sale. They did not redeem this particular piece however, as I recall it. I became interested in this because there was a vast amount of property involved and I convinced myself that these sales were held illegally, and that there was an excellent chance of setting aside the sales. I brought at least six or seven lawsuits on this, and in 1937 we had an appeal pending in the Circuit Court of Appeals on these lawsuits. These lawsuits were brought by the County on account of depository funds signed by these directors (of the First National Bank of American Falls) and Mr. Evans. This suit was pending in the Circuit Court of Appeals, and the County was holding a tax sale, and they put that property up for sale along with the tax sale of tax lands. Paul Evans and I made a bid on the property. We were the successful bidders and obtained our title then from the County, and subsequently dismissed our lawsuits after we purchased this land from the County at that sale.

From that time of acquisition in 1937 up until the time of the sale to the Westvaco Company the following was done with this property: There was one parcel there that had been in the Evans ownership a long time known as the Michaud Creek farmland, and it had a house on it, and always Evans always kept a man out there, and they were in the livestock business and used this particular land for livestock grazing. During World War II the airbase was just

across the highway and they came over and leased that for a rifle range. They just leased it by filing a notice of taking. They used it for a rifle range for about two years, and then it reverted back and was grazing ground again. I never had any interest in the livestock affairs, and I don't know to what extent it was used, but that was the general use of that land. We had numerous opportunities to sell to individuals. We never made a sale. In 1938, 1938 or 1940, I don't remember the year, but the City of Pocatello—we had the land immediately adjoining the west of their airport—wanted 80 acres. They could have condemned it if they had wanted to but we sold them 80 acres. I think it was about the next year that the Indian Service wanted to buy back 160 acres of land and restore it to the tribal lands. We sold that 160 acres back to them.

In 1940 on one of the tracts Paul Evans had drilled a well and was intending to farm it. This particular tract where he put the well I did not have any interest in, but we were working together on the deal, and before he got an opportunity to start farming the U. S. Air Force moved in and filed notice of taking 903 acres of that land, including the well. As soon as we could proceed again and in 1945 we went over to another tract and drilled another well to develop it, and we have been farming that since 1945. It is a 200-acre tract. I will back up and say that this land has long been contemplated of coming under the Palisades Project. There was an authorization for an irrigation system on that through the Indian Affairs Department in 1932 to

put that under water. It has always been our plan to hold that land and not sell it, however, when it was in the public interest we were willing to make a sale.

In 1943 Jack Simplot through an agent came to see us, and wanted to locate a factory site on some of this ground, and at that time we were very much pressured. Actually they wanted the site given to them. I remember the Secretary of the Chamber of Commerce and others came to see me. They got in touch with Evans and the Simplot people were determined they were not going to pay anything. They wanted the site given to them. Finally as an accommodation to them we agreed to sell them this ground for \$25.00 an acre, and did sell them the first 40 acres at \$25.00, but refused to sell them any more. Later they said they just had to have more ground, and we sold them another 40 acres. Now, those were the only sales that we made of any of this ground that we purchased at the county sale in 1937 at the time the land involved in this action was acquired, that is, that would be involved in this lawsuit. One was made later in 1953.

My contact with the Westvaco people came about in this way. My recollection is that I was in Tennessee and Judge Baum called me and said, "I think we have a hot deal coming up here, and that is that the Westvaco Company will want some of yours and Paul Evans' land for a factory site to make phosphorus or some such thing." I said "When I get back we can get together on the transaction," and then when I got back I got in touch with Paul Evans. We had numerous conferences with O. R.

Baum and representatives of the Westvaco Company. These were largely held in Judge Baum's office, and I don't remember how many months it was before we could finally get the thing worked out and get the deal made, but we finally did get the deal made and got paid for it.

We are still holding other land out there. I don't know what the last count is on it, but we have got 1,000 to 1,500 acres of it left.

As to any offers of purchase on that other land: We have had several. We have had people who have asked me to sell them land, particularly on this irrigated land out there, and we have flatly turned them down.

Since the sale of this piece of property to Westvaco, which was in the public interest, we have made one sale of a parcel of this land. This one sale was made in 1953. In 1953 Mr. Evans and I had been contemplating bringing another 80 acres under cultivation which cornered on the 200 we had in cultivation. However, Mr. Lindley had just put in a pressure system on the land which was immediately west of it, and had put in a main line of his pressure system right over to the edge of it. He came to us and talked us out of going ahead with it. He said he would like to buy it, and finally got the price where we figured it was better to sell to him than for us to go and develop the land and we sold it to him.

In answer to the question as to whether we have had any further offer from Westvaco: Yes, we have. Immediately after we sold this land to Westvaco we were called over to Baum's office again, and they

wanted the 160 acres lying immediately west of where their present plant is, and they gave us a written offer, and I believe I have that in my files and we flatly turned them down. This was and is a continuing and open offer, and they said that any time we want to take the offer we could. The price was higher than we sold the other ground for. We have refused to sell it.

Cross-Examination

By Mr. A. L. Biggins:

It is correct that Judge Baum called me someplace in Tennessee. I don't think he asked me if we were willing to sell the property. As I recall it he said it looked like Westvaco might put a factory here, and they had been looking for sites, and that they would like to consider purchasing this site, and that he wanted to talk to me about it when I got back, and that it was only in the beginning stages. And I told him that we were ready to negotiate on the property when I got back.

I don't know that it was immediately upon getting back that we entered into negotiations. As to whether there was much dickering, there wasn't so much. It was a matter of getting the sale closed. What I meant by dicker—in my previous testimony was that there was a matter of, or difficulty in getting the sale closed. We have several conferences with Baum. In the same telephone conversation Baum mentioned that Simplot wanted to buy some lots for an apartment house site (this is involved

in the case of Beverly B. Bistline vs. United States), and we had considerable dickering on that sale. I mean going back and forth and arriving at a price. We had to adjust the price back and forth several times.

J. PAUL EVANS

called as a witness by appellants, testified as follows:

Direct Examination

I live in American Falls and have lived there since 1907. I know F. M. Bistline, plaintiff in this case. I owned a half interest in the land sold to Westvaco along with F. M. Bistline. My father, I think, purchased that and all the other Michaud land around 1915 or 1916.

I recall beginning with the year 1926 through 1937, that I and my father and others had a lot of litigation about that Michaud land. I recalled that in 1937 this particular land was in the name of Power County and they put it up for sale, and that I and F. M. Bistline bid it in. It was bid in my part in the name of the Evans Investment Company. My interest was a half interest, and the other half interest was his.

I recall the plans we had with regard to the Michaud property. I planned on farming it and grazing it. I was running livestock at that time. I was using this for grazing and had been using it for grazing since we acquired it.

I do not know whether this particular piece of land that Westvaco bought was used by the Govern-

ment for a rifle range. It could have been on the quarter section next to it.

I never did place this property or any of the Michaud property on the market with a view of selling it. I have done considerable developing of that property out there. I put down the irrigation wells, and irrigated some 300 to 400 acres of land. The first well was put in 1940 or 1941. The one on the west side of the track next to the airbase, east of the airbase, was put in 1944, and I put another one down in 1948 on the south side, and then about two weeks ago I put another one down on the south side of the track. I intended to keep this property to farm it.

I recall the circumstances when that property was sold in 1948 to the Westvaco Company. Judge Baum and Jack Simplot came down to my house one evening and tried to buy it. Simplot said he thought he could locate some manufacturing plant in there. I told him so far as I was concerned it wasn't for sale right then, that I had a part interest and I would have to get in touch with F. M. Bistline, who was away and I wouldn't make any price at all to him at that time. Subsequently after F. M. Bistline returned he and I got together and discussed the matter and met with Baum and some of these Westvaco people, and finally gave them an option at about \$100 an acre for 210 acres, and subsequently the sale was made.

My recollection of the number of acres that was included in that land F. M. Bistline and I bought from Power County in 1937 was around 3000 acres.

that is more or less. We made no sales of any of the land purchased by us at that sale in 1937 except 80 acres for the airport, 160 acres to the Indian Reservation, I believe 120 acres to Jack Simplot. Also, 903 acres of it was condemned by the air force, but some of that 903 acres was my own. We did not make any other sales of that ground. I do not recall anybody approaching me with regard to buying the ground which Westvaco bought prior to 1948.

I recall after this sale was made to Westvaco we had a conference in Judge Baum's office and an offer was made to buy some more of that land. It was directly west adjoining the land that was a half mile west of the land we sold to Westvaco. Lindley had 160 acres in between we sold to Westvaco. This would be half mile west of the land we sold.

The paper which had been handed me marked "Plaintiff's Exhibit No. 3" is an offer made by the Westvaco Chlorine Corporation for some land out at Michaud. I recall that I received that at Judge Baum's office. I recall that there were several copies made of that. I think Judge Baum would have a copy, and they gave me this copy, and I think I turned the original over to F. M. Bistline. The signature on this proposed exhibit is that of W. T. Nichols. I was present when he signed that letter. I saw him sign it. The copy that I have here is a duplicate original. Mr. Nichols is an officer or someone connected with Westvaco Company. I think he was out of New York, if I remember right.

Plaintiff's Exhibit No. 3 was admitted without objections.

Referring to Exhibit 3 the parcels referred to therein are roughly 80 or 90 acres next to the railroad tracks which run a half mile from the corner of Lindley's land that Westvaco now own, directly west down to the railroad tracks and then another half mile or whatever it would be which jogs across the track due south. That is the first parcel and we were offered \$150.00 an acre. The next parcel would be land adjoining that on the south, and would run another 80 acres. They offered \$125.00

Part of the land is irrigated and part dry land and part grazing. The part that is grazing is back south of this last portion here that they offered \$125.00 an acre for.

That offer of Westvaco was never accepted. It is not for sale at present. None of the Michaud property is for sale so far as I am concerned.

Cross-Examination

By Mr. Biggins:

I am in the real estate business and have been for a number of years. It is not part of my job in the real estate business to run this Evans Investment Company. The Evans Investment Company is a corporation. F. M. Bistline got one share of stock when we organized the company. I do not know whether an examination of the corporate articles of that company would show the purchase of land to be within the scope of its business ac-

tivity. I have purchased land since I have been associated with that company and I think I have been very careful to be within its corporate articles. Originally one of the purposes of this company was not to purchase land, it was a family organization to raise livestock and farm. I think Mr. Bistline was one of the incorporators. I don't know what the articles state with regard to one of the purposes of the corporation being to buy land.

Since I have been connected with that company, just the one sale is all I ever bought—that tax sale, which included over 3000 acres. I don't think we bought anything else but this land in the name of Evans Investment Company, but I am not sure. This Company has sold real estate including the sale to Westvaco.

As to whether or not we entered into negotiations on a second sale, they made an offer we did not accept. This was in Judge Baum's office. F. M. Bistline and Mr. Nichols were present. We were talking about this second possible purchase. As to whether or not we just couldn't get together on price, well, it wasn't for sale at that time. They called me and asked Mr. Bistline to come up there. I didn't tell them over the phone I was not interested in selling. We could have gone up there to talk price.

Westvaco is on the right hand side of the highway coming from American Falls to Pocatello. Most of the other stuff is on the left side of the highway but about two and a half miles back from the highway.

I regard myself as a qualified real estate man. From a real estate man's point of view this piece of property was not the least satisfactory property in that tract. It was against a hillside. It was not on the wrong side of the highway for farming and stuff like that. We didn't have water there for farming at that time. We never did dry farm the piece sold to Westvaco.

We put in one well across the highway on the left-hand side. We have two wells on this (right-hand side).

I said Judge Baum and Jack Simplot came to see me about selling this property and I said so far as I was concerned I couldn't talk sale, and I didn't own all of it. I did not suggest or tell them to get ahold of Mr. F. M. Bistline. I told them I would have to talk to him, and when he got back I got together with him and with them and agreed on a price.

This is not the only land I ever bought with Mr. Bistline. We bought the land that is now Fremont Heights. My purpose in buying that was because I thought it was a good buy. My answer to your question as to whether or not it is right that I thought I could sell it for a profit, my answer is that anything I have I would sell for a profit including the Michaud Flats, if I wanted to. And including the sale to Westvaco. And including anybody who came into my real estate office if it was high enough I would sell it. As to whether or not that is exactly why I decided to sell to Westvaco, my answer is yes, if

the price is right anything I have is for sale. I am in the real estate business but the corporation isn't. I have been for a good many years. So far as I am concerned anything is for sale if the price is right. I bought some other properties with F. M. Bistline in Bannock County and Power County and I guess that my testimony that all of this was held for sale if the price was satisfactory would apply to all these properties.

Redirect Examination

By Mr. Bistline:

I previously testified and again testify that this piece that was sold to Westvaco was held for farm property and used for that purpose and we were expecting to use it as that, and that it was not for sale except under the circumstances mentioned here.

Mr. F. M. Bistline: It is hereby stipulated by and between counsel for the respective parties that the following statement is a true, correct and accurate statement of the facts therein stated, to be considered by the court in the trial and determination of the above-entitled cases in addition to the evidence adduced at the trial, and such other stipulations of evidence as may be in the record.

I.

That the three above cases (F. M. Bistline vs. U. S. No. 1884, Anne Bistline vs. U. S. No. 1885, and F. M. Bistline and Anne Bistline vs. U. S. No. 1887) are consolidated for the purpose of said

trial, and that all of the actions arise under the Internal Revenue Laws of the United States of America.

II.

That F. M. Bistline and Anne Bistline, the plaintiffs in all of the above cases were at the time of the commencement of this action, and ever since the 16th day of August, 1921, have been and now are husband and wife.

* * *

VII.

That on or before the 15th day of March, 1949, the plaintiffs jointly filed an income tax return on Form 1040 for the calendar year 1948, showing among other things that in said calendar year, 1948, they disposed of real properties held for more than six months, which were reported in Schedule D of their respective returns as follows as to description, date acquired, date sold, net gain and to whom sold:

Description	Date Acquired	Date Sold	Net Gain	To Whom Sold
Lots 5, 6, 7, 8, Block 1, Park Addition	1938	4/14/48	\$ 20.00	
Lots 18 & 19, Block 353	1936	4/28/48	70.00	
Interest in tract in SE $\frac{1}{4}$ Sec. 12; NE $\frac{1}{2}$ Sec. 13, T. 6 South, R 33, E.B.M.	1937	5/14/48	8,719.66	Westvaco Corp.
One-half int. S $\frac{1}{2}$, Block 4, Inglebrook Acres.....	1938	10/22/48	1,700.00	L. D. S. Church
Block 40, Poca.	1939	5/25/48	880.00	Empire Invest. Co.
$\frac{1}{2}$ int. Lots 11, 12, Block 41	1943	5/25/48	90.00	Empire Invest. Co.
Lot 16 Block	1939	5/13/48	80.00	Poc. Heights Corp. (Simplot Apts.)
$\frac{1}{4}$ int. Lot 13 and N. 20' 12, Block 381, Poca.	1936	1/ 3/48	90.00	
$\frac{1}{4}$ int. S 10' Lot 12, all of Lot 11 and N 10' Lot 12, Block 381	1936	5/21/48	90.00	
$\frac{1}{2}$ int. Lots 1, 2, 13, 14, 15, 16, Block 16, Downey, Idaho	1943	3/19/48	68.58	
$\frac{1}{2}$ int. L. 23, 24, Block 2, Inglenook Acres	1938	6/ 3/48	300.00	
$\frac{1}{2}$ int. in N $\frac{1}{2}$ Lot 22, S $\frac{1}{2}$ Lot 23, Block 4, Inglenook Acres	1939	9/ 2/48	183.50	

That the above property was vacant lots in the City of Pocatello except as otherwise indicated; that the first two parcels were by quit claim deed; that the last five parcels, with the exception of the Downey property, were made by A. Y. Satterfield in connection with a real estate development of said lots and other adjacent lands in Alameda, Bannock County, Idaho, that the sale of the Downey property was by quit-claim deed.

* * *

XVI.

That in the event the plaintiffs, or either of them, in the three actions, are found by the Court to be entitled to capital gain treatment of the properties in said cases involved, that judgment may be entered in each such action for the respective plaintiff or plaintiffs, in the amounts as prayed in said complaints, or proportionately in case some of the sales of some of the properties are held by the court not to be entitled to capital gain treatment, provided, however, that the amount of any such judgment shall be subject to the correct mathematical computation thereof in accordance with the Internal Revenue Laws of the United States of America in such cases made and provided.

/s/ F. M. BISTLINE.

/s/ BEVERLY B. BISTLINE.

/s/ R. DON BISTLINE.

Attorneys for Plaintiffs.

/s/ A. L. BIGGINS.

Attorney Dept. Justice.

Attorney for Defendant.

Appellant submits and files the above and foregoing as a true, full, correct and complete narrative summary statement of all of the testimony offered or received, and all the proceedings had in the trial court at and in connection with the trial of said cause, for use upon its appeal taken to the United States Court of Appeals for the Ninth Circuit.

Dated this 6th day of June, 1957.

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 6, 1957.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.

2. Answer.
3. Memorandum Opinion.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Notice of Appeal.
7. Statement of Points to Be Relied Upon by Appellant.
8. Narrative Statement of Testimony and Proceedings.
9. Designation of Matters to Be Included in Record on appeal.
10. Original exhibits Nos. 2, 3 and 5.
11. Order for Transmittal of Original Exhibits.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 20th day of June, 1957.

[SEAL] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15607. United States Court of Appeals for the Ninth Circuit. F. M. Bistline and Anne Bistline, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed June 24, 1947.

Docketed: June 28, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15607

F. M. BISTLINE and ANNE BISTLINE, Hus-
band and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT

Following is a concise statement of the point upon which appellants intend to rely on the appeal of the above-entitled cause:

The District Court erred in entering judgment denying plaintiffs the right accorded by the Statutes in such cases made and provided to pay their income tax on one-half of the gain realized by them on a sale during the year 1948 of a parcel of real estate which had been acquired by them in 1937 and referred to in the complaint and described as follows: "Interest in tract in Southeast Quarter Section 12 and the Northeast Quarter of Section 13, Township 6 South, Range 33 E. B. M." and commonly referred to in the evidence as the "Westvaco Sale."

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Plaintiffs-
Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1957.

